WITNESS PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3086

WITNESS PROTECTION ACT

JUNE 22, 1983

Serial No. 100

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WITNESS PROTECTION ACT

WEDNESDAY, JUNE 22, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:40 a.m., in room 2226, Rayburn House Office Building, Hon. Robert Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Schroeder, Glickman, Frank, DeWine, and Sawyer.

Staff: David W. Beier, assistant counsel; Audrey K. Marcus, clerk.

Mr. KASTENMEIER. Our witnesses today will be commenting on a specific bill. I would hope that in addition each of us will keep in mind the anguished cries for compassion and justice that we have all heard from the victims of this program. It is only through reforming the program that we can hope to see it through to its successful goal of attacking organized crime, while simultaneously accepting the responsibility of compensating or otherwise assisting innocent parties who are harmed when we accept the risks created by this program.

[The statement of Mr. Kastenmeier follows:]

OPENING STATEMENT

This morning the Subcommittee continues work that began last Congress on the various activities of the Marshals Service. As Members will recall last year we had two days of hearings on the witness security program and the service of process by the United States Marshals. As a result of legislation enacted late last year the major problems with service of process have been resolved.

The task that remains for us in restructuring the United States Marshals Service focuses on two issues: the method of selection of United States Marshals and reorganizing the Witness Security Program. To effectuate that goal I have introduced H.R. 3086. Members have a copy of the bill and an explanation thereof in their folders.

At this point let me briefly outline the major features of the legislation before us. First, the bill creates a merit selection system for the appointment of Marshals. This approach has long been the position of the Marshals Service and many thoughtful people within the Justice Department. One important reason to make the various Marshals offices subject to greater control by the Attorney General is management efficiency. A second reason is to remove partisan politics from the selection process. Merit selection should also serve to improve the quality of the Marshals and improve professionalism within the Marshals Service. Finally, direct accountability to the Attorney General will make it easier for the Marshals Service to effectively implement the Fugitive Apprehension program and the Witness Security Program.

The second major feature of the bill is to provide a statutory charter for the Witness Security program. Perhaps more than any other program of comparable size

(with appropriations of less than $30 million/year) this program has been the subject of repeated news stories and Congressional investigations. Most of the criticism of the program is an inevitable result of the conflict between using persons involved in crime to solve or prosecute other more large scale criminals. On the other hand some species of criticism of the program calls for legislative solutions.

Before turning to these solutions, let me take a moment to call to the attention of the Subcommittee the testimony of some witnesses from past hearings. Last Congress this panel received testimony from our colleague Rep. Virginia Smith (R. Neb) concerning the crime spree of protected witness Marion Albert Pruett. At the same time we heard from the parents of one of the crime victims of a protected witness. What is abundantly clear from their testimony is that the Federal government has a special responsibility to the victims of crimes committed by protected witnesses.

Last Congress this Subcommittee also heard testimony from Janet Schlachter whose husband was placed into the witness security program leaving her destitute. In previous Congresses the Senate Permanent Subcommittee on Investigation has heard similar testimony. In addition, that panel built a clear record concerning the problems that protected witnesses face in obtaining compliance by the government with promises made to such witnesses.

Thus, it was with all of these previous hearings that my bill on the witness security program was drafted. The bill attempts to develop a balance between the interest of the public in the prosecution of organized crime cases and the need to protect the public from abuses and crimes committed by protected witnesses. The bill has 5 (five) major features in this regard:

(1) Admission to the program is more closely monitored (approval for admission may only be made by top Justice Department officials and each program participant must be screened for risk);

(2) The obligations of both the government and the witness are clearly delineated (a non-judicial grievance mechanism is added to resolve disputes);

(3) The obligation of the Justice Department to respond promptly and truthfully to request for information from state and local enforcement authorities is strengthened;

(4) The obligation of the government is clarified with respect to assisting persons who have judgments (either money, or custody or visitation) against protected witnesses; and

(5) A victim compensation fund is created for victims of protected witnesses' crimes.

The policy recommendations found in this bill are derived in many instances from the work done by Senator Nunn and Baucus, and more recently by the pioneering work done by Senator Cochran. I must also note that the bill has been improved by suggestions made informally by both the General Accounting Office and the Department of Justice.

Our witnesses today will be commenting on a specific bill. I hope that in addition each of us will keep in mind the anguished cries for compassion and justice that we have all heard from the victims of this program. It is only through reforming the Witness Security Program that we can hope to see this program through to its successful goal of attacking organized crime, while simultaneously accepting the responsibility of compensation or otherwise assisting innocent parties who are harmed when we accept the risks created by this program.

Mr. KASTENMEIER. Therefore, it is with a great deal of pleasure to welcome as our first witness today the distinguished junior Senator from Mississippi, the Honorable Thad Cochran. As a member of the Appropriations Subcommittee on State Justice and Commerce, and the Judiciary Committee, Senator Cochran has been extensively involved with the oversight of the Witness Security Program. In the last Congress he held a productive hearing in his home State on the functioning of the program.

He is also the author of legislation introduced in this session in the Senate, S. 474, which would make substantial changes in the Witness Security Proram.

Senator Cochran, you are most welcome. We appreciate your taking the time to come over here and testify today. You may proceed as you wish.

TESTIMONY OF HON. THAD COCHRAN, U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Thank you very much, Mr. Chairman.

First let me congratulate you on your initiative in this area of examining the Federal Witness Security Program. I think, as you do, there are changes that need to be made in the legislative authority under which the U.S. Marshals Service and the Department of Justice operate and administer this important program.

As you point out, as a member of the Committee on Appropriations in the Senate, I chaired a hearing in my State of Mississippi early last year, in response to three very tragic criminal acts which were committed in my State by persons who had been placed under the protection of the Witness Protection Program.

I have prepared a written statement and have filed it with your subcommittee. I won't read it in its entirety but will refer to it and make some summary comments.

Let me tell you about these three incidents that brought the program and some of its deficiencies to my attention and to the attention of citizens not only in my State of Mississippi but throughout the country because of the widespread publicity that was received.

In 1979 a person named Earl Leroy Cassel, who was under the protection of this program, committed a very violent, heinous murder/robbery in Pascagoula, MS. In 1981 there was a robbery committed in Natchez, MS, by Warren Sims which resulted in a death. In 1981, the case that has received a tremendous amount of publicity, was a kidnap/murder committed by one Marion Albert Pruett, who had been under the protection of this program and had been released as a suspect in New Mexico of the murder of his wife. When local officials couldn't obtain any information about his background, they had to release him. They didn't have any hard evidence to go on. That led to the beginning of a robbery and murder spree that carried him through several States and ultimately into the State of Mississippi where the final murder that he committed resulted. He has now, of course, been sentenced to death in two different States.

The point of this is that the people of my State, and, I think citizens all around the country, wonder whether or not the Government is relocating under new identities persons who have a potential for committing violent criminal acts in communities where neither the local law enforcement officials nor innocent citizens are aware of their presence but may be subject to harm, even murder, by reason of the relocation and protection of these potentially violent persons by the Federal Government.

First let me say I think the Witness Security Program is an important program in our battle against organized criminal activity. But I think we need to pay more attention to the administration of the program and to the screening of those who may be eligible for relocation under the program to try to identify those who may very well be potentially dangerous to the innocent citizens in the communities in which they are relocated.

I know that the Marshals Service has always had a screening mechanism in place, but the only psychological testing and screening that was being undertaken at the time of our hearings last

year was vocational assessment, what job would the person be best suited to perform in the new environment in which he would be relocated. In my judgment, as a result of the evidence that we obtained, there was not enough being done to try to determine whether innocent citizens may be subject to criminal conduct by these persons in the relocated environment.

This is all the more important when you realize that 95 percent of the people who are put into this program have a criminal record. I know statistics would show that the rate of recidivism among those who are relocated under the program is much less than the general criminal population at large, but nonetheless, I think we cannot ignore the fact that we do have potential for great harm to innocent persons if we are giving the full protection of the Federal Government to these persons in a relocated environment, under a new name, and supported by tax dollars.

In my statement I refer to some provisions of the legislation which I have introduced in the Senate. I am happy to see that some of the provisions of your bill, Mr. Chairman, are similar, in some cases identical, to the provisions in the Senate bill, S. 474.

I think we are on the right track. I think we need to get this legislation moving along. I hope that we can see enactment of the bill in this session of the Congress. You have my assurance, Mr. Chairman, that we will do everything possible over on the Senate side to get our committee to move on the legislation and get it before the full Senate.

Let me add one other aspect to the statement that I have made. Sometimes overlooked is the difficulty that those who may be involved in civil litigation or have claims against these relocated witnesses have in realizing satisfaction of judgments or obtaining satisfaction of claims against these persons because they have been relocated and their identity has been lost. There is an article this week in U.S. News & World Report which talks about that aspect of the problem.

We have in our bill, and I think you do as well, a provision that would require the Attorney General to make reasonable efforts to serve process in civil proceedings and to take appropriate steps to urge the protected person to comply with judgments which have been rendered against him.

Of course, we realize this has to be balanced with the interest to keep the identity of the witness protected because of the potential harm to which he may be subjected. So we leave a fair amount of discretion with the Attorney General to take such action as he deems appropriate under the circumstances.

I commend you also for including in your bill the witness compensation fund. That is also in S. 474. I think we have an obligation to make sure the Government responds to the needs of innocent citizens who are victimized by persons our Government places in their communities, particularly when they have exhausted all other avenues of compensation that may be available to them by reason of harmful acts committed by a Federally protected witness.

Mr. Chairman, that is the conclusion of my testimony. I commend you for the work you are doing and urge you on. I think we need to respond legislatively. I know some changes have been made administratively, and I commend the Department and the U.S.

Marshals Service for responding in the way they have. But I still think we need to address the problem from a legislative standpoint.

Thank you, Mr. Chairman.

[The statement of Senator Cochran follows:]

STATEMENT OF SENATOR THAD COCHRAN, BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, U.S. HOUSE OF REPRESENTATIVES, SEPTEMBER 10, 1982

Mr. Chairman, my statement deals primarily with two functions of the Marshals Service. The first is the Federal Witness Security Program which was created by Congress under the Organized Crime Act of 1970. The second is the service of civil process for private litigants in Federal courts.

My interest in the Federal Witness Security Program stems from three tragic incidents which occurred in Mississippi. In Jackson last fall, a federally protected witness, Marion Albert Pruett, kidnapped and murdered a savings and loan employee, Peggy Lowe, during an armed robbery. Two other crimes involving protected witnesses were committed in the state: a murder/robbery in Pascagoula by Earl Leroy Cassel and a bank robbery in Natchez by Warren Simms that resulted in a death.

These incidents raise serious questions about the operation of the program and prompted me to request a hearing by the Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies of the Senate Appropriations Committee to examine its administration.

I chaired this hearing in Jackson, Mississippi on July 6, 1982. We reviewed the incidents described as well as the policies and procedures of the Criminal Division of the Department of Justice and the U.S. Marshals Service relative to the program.

Appearing before the Subcommittee were state and local law enforcement officers who investigated the crimes committed by protected witnesses, and officials of the Criminal Division and the Marshals Service responsible for the operation of the program. Statements were also submitted by persons who have been defrauded by protected witnesses and who are unable to recover damages because the whereabouts of the defendants are known only to the Marhsals Service.

This testimony before the Subcommittee revealed at least three problem areas in the operation of the program which need attention. These are (1) the criteria for admission of a witness into the program, (2) the communication of vital identification information to state and local law enforcement agencies, and (3) the cooperation by the Department of Justice in civil litigation by innocent citizens against protected witnesses.

The admission of witnesses into the Federal Witness Security Program is the responsibility of the Office of Enforcement Operations (OEO) which was created in the Criminal Division in 1979. A witness may be admitted to the program if he is an essential witness in a significant case connected to organized criminal activity and whose life is or will be in jeopardy. An initial application is submitted to the Office of Enforcement Operations by the U.S. Attorney who documents the significance of the case to the administration of justice. The investigative agency involved assesses the threat to the witness and submits its report to OEO. The Marshals Service interviews the witness to determine his suitability for the program. Based on the reports submitted, the OEO makes the final determination whether or not to admit a witness into the program.

It is my view that the Department must give more consideration to the potential threat posed to a local community by the relocation of a protected witness. This becomes more obvious when one considers that 95% of these witnesses have criminal records.

Department officials claim that the interests of local communities are balanced against those of the prosecutors seeking convictions. But the balance scale seems to have been tipped in favor of the prosecutors. The significance of the case, the threat to the witness, and his suitability for the program are assessed by various agencies, but none are charged specifically with assessing the potential for harm to the innocent citizens of the community to which he will be relocated.

The Marshals Service has taken a positive step toward the increased consideration of the potential threat of the witness. It has contracted with a group of psychologists to develop and conduct psychological testing of the witnesses. This testing is primarily vocational assessment. It should also be used to assist in the identification of those persons who would present the most danger to local communities. The Criminal Division and the Marshals Service should develop additional mechanisms for such in-depth screening.

Another distressing revelation of the subcommittee hearing was the difficulty encountered by Mississippi State and local law enforcement officers when requesting fingerprint and criminal background information from the Federal Bureau of Investigation.

Under the current NCIC system, the witness' new name is flagged and cross-indexed with his old name. When an inquiry is made by local law enforcement to the F.B.I., the Marshals Service is notified of the inquiry and determines whether to release the requested information following the determination that the inquiry is "legitimate". The Marshals Service has set 24 hours as its response time goal.

In each of the three cases we examined, however, law enforcement officers were unable to obtain fingerprint verification and criminal backgrounds from either the F.B.I. or the Marshals Service, and were forced to seek alternative channels for obtaining the information requested.

In the bank robbery case in Natchez, information concerning the witness' criminal record necessary for indictment under the Mississippi Habitual Offender Statute was never received by the Natchez Police Department. As a result, Warren Simms could not be charged as an habitual offender. Moreover, the investigating officers were forced to seek assistance from the F.B.I. Special Agent in Charge in Mississippi just to obtain confirmation of the fingerprints.

In the murder-robbery case in Pascagoula, law enforcement officers were fortunate to discover the name of the U.S. Attorney in Wisconsin who placed Earl Leroy Cassel into the program. Only through this were they able to obtain the information they needed to identify and prosecute Cassel.

In the case of Marion Albert Pruett, local law enforcement officers in Albuquerque, New Mexico had to release him as a suspect in the death of his wife because a record check revealed no information about the past criminal behavior of Charles "Sonny" Pearson, his alias, or his true identity as Pruett. While this error was attributed to clerical mistake, Pruett was free to continue a murder and robbery spree in other states. If the information had been available, perhaps several of his victims would not have been murdered.

It is apparent to me that the current system for the release of criminal background information to state and local law enforcement agencies must be improved. One cannot over-emphasize the importance to state and local law enforcement of the prompt identification of persons held as suspects.

Officials at the Department has advised that an "understanding" has been reached between the F.B.I. and the Marshals Service to provide for the "rapid return of information". This procedure will provide for off-duty or after hours assistance by the F.B.I. and the Marshals Service for response to inquiries from law enforcement agencies. Certainly, this is a positive step, but more should be done to ensure that law enforcement agencies are provided with effective methods for identifying criminal suspects.

Another facet of this communication problem is the Department's policy to withhold the release of identification information when a protected witness is being held for the commission of a misdemeanor and will be released immediately on bond. The witness' true identity is revealed for all felony arrests. The justification for this policy is the breach to the witness' security and the enormous expense of relocation. However, such a policy undermines the law enforcement efforts of local agencies and pits them against federal agencies. The F.B.I. is placed into a position of responding untruthfully to such inquiries. Not only should Department policy foster a spirit of cooperation between the various law enforcement agencies, but a witness should not be shielded from the consequences of his criminal activity.

I have noted with great interest the provision in H.R. 7039, currently under consideration by this committee, requiring the Attorney General to provide relevant information to law enforcement officials concerning a criminal investigation or proceeding. Such a provision is necessary if we are to assist such agencies in the apprehension and prosecution of those who commit crimes.

Consideration should also be given to the issues of notification of local officials that a witness is being relocated to an area and supervision after the witness has been relocated. While the security of the witness and his successful assimiliation into the local community may mitigate against full disclosure and supervision, it would seem that limited procedures could be developed. At the time Warren Simms robbed a bank in Natchez, the Marshals Service was searching for him as a suspect in a food stamp fraud in Oklahoma. Had he been supervised more closely, he may have been apprehended before fleeing Oklahoma and committing his crime in Natchez several months later.

A final aspect of the program explored briefly by the Subcommittee was the degree of cooperation by the Department of Justice in civil litigation instituted by

third parties against the protected witness. The Departmental Policy has been to provide service of process only. Recently, this policy had been expanded to provide for the release of the witness' identification and location on a case-by-case basis. However, a dollar figure of $500 was mentioned as the threshold for such disclosure, thus depriving some innocent citizens the information they need to seek satisfaction from the witness.

The provision in H.R. 7039 for action by the Attorney General to reveal the identification and location of the witness when such witness has not made reasonable efforts to comply with the judgment and to enter such order as he deems appropriate to require the witness to take action will hopefully provide the needed remedy to those citizens who have been victimized by protected witnesses.

The Federal Witness Security Program has been an important law enforcement tool against organized criminal activity, and I believe it must be continued. However, the rights, well-being and safety or innocent citizens must be protected.

I would now like to comment briefly on another aspect of the legislation under consideration by this Subcommittee.

I have been very concerned about proposals to restrict, or even prohibit, the service of civil process by U.S. Marshals. While in the Senate, I have opposed the effort to end all service of civil process by U.S. Marshals. I have been concerned about both the integrity of our federal court process and the availability of alternative process servers for litigants using the federal courts.

While service of process alternatives exist in many of the major metropolitan areas of our country, there are many districts, especially in rural areas, where alternative service of process is not available. In these areas, it is essential that litigants be able to obtain the assistance of U.S. Marshals.

Under present law Marshals will serve process upon request, upon payment of a statutory fee of $3. If some are concerned that this system improperly subsidizes private plaintiffs, this could be remedied by amending the statute to allow the Attorney General to set the fee at a level which would recover actual government costs. This idea was recommended by the General Accounting Office and adopted by the Senate when I offered it as an amendment to the FY 1981 Department of Justice authorization bill. This approach eliminates the subsidy issue, while at the same time guaranteeing that orders of our courts will be served in a reliable manner. Morever, this encourages the competition of private sector process servers by creating a free market incentive. Unfortunately, that bill was never signed into law.

This year, the Senate adopted a provision for the service of private process by the U.S. Marshals in proceedings in forma pauperis, or when the District Court determines that no other method is available and effective. It also provides that the Attorney General may set fees for the service of process at a level commensurate with the expense of such service. While I believe this is less desirable than my approach, it is still better than no provision for service, by Marshals.

H.R. 7039 would go further to provide for service of civil process by U.S. Marshals pursuant to an affidavit by any party indicating that service by other means is not feasible. I commend Congressman Kastenmeier for the inclusion of this provision which I believe will better protect litigants and the integrity of federal court process.

Mr. KASTENMEIER. Thank you, Senator Cochran. I certainly agree with you. I agree that the Marshals Service and the Justice Department have improved the program. But some of the problems still remain and I think the situation still cries out for some sort of a charter so that the parties will know what their responsibilities are.

One of the areas in which the Justice Department resists changes, which are incorporated in your bill as well as the House bill, is to fix responsibility at the highest level, at the highest several levels in the Justice Department in terms of the screening process and for other purposes. I wonder whether you care to comment on that, the necessity of having, if not the Attorney General, the Deputy Attorney General, the Assistant Attorney General, Criminal Division, an official at a high level, be responsible for decisions.

Don't you feel that to do otherwise tends to really let the Department off the hook, in a sense, by allowing decisions to be made literally by persons who are not known and don't have a direct responsibility to the Congress and the country?

Senator COCHRAN. I think it might be unrealistic to expect the Attorney General, as a part of his daily duties, to be personally involved in the administration of the Witness Security Program, but that is not to say there is no responsibility in the Attorney General or other high officials of the Department, or in the same capacity I would identify the responsibility of the head of the U.S. Marshals Service. But nonetheless, I think that through attention to the serious consequences that could result from mistakes in the administration of the program, that the highest levels of the Department should be attentive to the needs to improve the program. As I said, I think there has been some improvement. But yes, you are right. They can't get rid of the responsibility, but necessarily they're going to have to delegate to persons within the Department the day-to-day responsibility for administering the program.

Mr. KASTENMEIER. We have a recent case, which may be a States rights issue—and I know Judge Robert Bork, the former Solicitor General, filed an opinion about it very recently on a witness protection case—about the rights of the States in terms of their domestic relations laws being voided, so to speak, or set aside effectively in terms of visitation rights or other rights, when confronted with the witness security program, insofar as the admission of a person into the program enables the witesses to evade their responsibility pursuant to court orders under State law, that that is an undesirable result and some accommodation ought to be made—I don't know precisely how—between these two competing elements, the program and compliance with the judicial orders pursuant to State law.

Do you have any feelings about that?

Senator COCHRAN. I think they are going to have to look at these problems on a case-by-case basis. I don't think we can make a sweeping pronouncement in legislation that is going to solve every problem that is encountered in the program administratively. But I think, generally speaking, there ought to be a mechanism by which persons who are relocated are held responsible for their own conduct, whether that is criminal conduct or whether that conduct is previous conduct in the nonpayment of debts. I don't think we ought to permit these persons to get out from under those legal obligations. A court order, of course, I think has the same kind of force and effect. The Attorney General and those who are responsible for administering the program ought to weigh a person's eligibility for the program and give consideration to the consequences that might befall innocent persons by reason of a decision to relocate a witness under the program.

Mr. KASTENMEIER. Well, I thank you, Senator Cochran.

I would now like to yield to my colleagues. The gentleman from Kansas, Mr. Glickman.

Mr. GLICKMAN. Thank you, Thad. It's a pleasure to have you here.

If you had to outline what the greatest specific statutory need would be in this area, what would it be, in the witness protection area?

Senator COCHRAN. I am sort of partial to the provisions of S. 474. I think each of the provisions we have included in the bill are addressing a need that did exist at the time our hearings were conducted last year. Some of them continue to exist. In my judgment, the establishment of the Victims Compensation Fund is important.

One item that I didn't mention in my verbal testimony, which is included in my statement, is the need for a greater degree of cooperation and communication between the U.S. Marshals Service, the FBI, the Department of Justice, and local law enforcement officials, who may be confronted with criminal conduct on the part of a witness whose identity is being protected under this program.

In two of the cases that I mentioned, local prosecutors had to circumvent the usual channels of communication to find out the real identity of the person they had apprehended and were about to charge with a criminal act. And in one case they never did get enough information about the criminal background of a suspect until it was too late to prosecute him under the habitual criminal offender statute in our State. And rather than serving a prison term of 20 years, or whatever it would have been under that statute, this person is about to be released from the State penitentiary for robbery that resulted in the death of a person. The prison sentence would have been much different had all the facts been known of his previous record. So I think the provisions we have in the legislation that require a greater degree of sensitivity to the needs of local law enforcement officials is important as well.

Mr. GLICKMAN. Let me ask you this. I have looked at the chairman's bill, and I think it refers to this, but not perhaps as specifically as it should. Should there be specific language in the bill that as part of the requirement to determine if a person would be subject to this program there would be a bar on making that person subject to this program if he is judged to be a greater danger to the community than he would be a value to the law enforcement officials?

What I'm saying is, what if you have somebody that you know is—you need to protect him, but at the same time you are pretty confident that this person is going to be a problem for the public at large in some way; I want to make sure the Justice Department has that kind of discretion and, in fact, mandate, to keep somebody like that out of the program if they have reason to believe that person is going to become a danger in the community.

Senator COCHRAN. I think you're right, Congressman. That standard——

Mr. GLICKMAN. Maybe it's in the bill.

Mr. KASTENMEIER. Would the gentleman yield?

Let me just read from my bill on page 4.

The Attorney General shall make a written assessment in each case of the possible risk of danger to persons and property in the community where the person is to be protected and is to be relocated, and shall certify that the need for the person's testimony outweighs the risk of danger to the public.

Mr. GLICKMAN. OK. It's there. That's fine.

Mr. KASTENMEIER. It is probably also in your bill, too, Senator.

Senator COCHRAN. That also is included in S. 474. That is a standard that I think is important to have in the legislation.

Mr. GLICKMAN. And that would be a continuing standard, too, I assume, if during the period the person is under protection these standards are breached, then the Justice Department would reserve the right to revoke the protection.

Senator COCHRAN. Yes. An additional standard occurs later in the program, and a question has to be asked about releasing the identity of the witness. That is the potential for harm to that witness. The Government has entered into an agreement with that witness to protect him in exchange for his testimony which was considered valuable in the prosecution of an organized criminal case. If later the Department is confronted with a decision to make, "do we disclose the identify of this person and subject him to possible murder because of the testimony he gave", I think that has to become another part of the decisionmaking process. So that can't be overlooked.

Mr. GLICKMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. No questions, Mr. Chairman.

Mr. KASTENMEIER. The gentlewoman from Colorado, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I just wanted to ask about the victims of compensation, the victims compensation fund. Do you think the Justice Department will back this? Do you have any idea?

Senator COCHRAN. I don't recall what the Department's reaction to this provision is. I would hope they would support it.

It is not too overly generous, I would say that. The bill proposes a $25,000 obligation in a death case. It creates a fund of about $2 million, collected in fines under another law, a racketeering law, 18 U.S.C. 1963. So I think this is not overly generous. It does not call for the appropriation of a large amount of Federal dollars. I think it's a very modest response, and certainly the least that could be expected the Government could do in these cases.

Mrs. SCHROEDER. I thank you very much for your attention and being here.

Mr. KASTENMEIER. I would like to express concurrence with those comments. It seems to me the Congress has expressed generally in the victims of crime compensation. It has not yet actually become law, but a very large number of the Members in the past have attempted to get through general bills, and the President has expressed an interest in compensating victims of crime generally, without that specifically being put into any statutory form.

So it would seem to me, where you have a situation when the Federal Government intervenes to take someone who may have a questionable background, cloak that person with an alias, relocate that person in a community, by virtue of the Federal intervention has a very special obligation that might not exist in other victims of crime situations but certainly in that situation.

Senator COCHRAN. I think that is a very strong argument for the fund. I hope that your committee will approve it.

Mr. KASTENMEIER. I would like to call on the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Glad to have you here, Thad.

Really, I think your provision for compensation is too modest. For some reason, we provide a $50,000 benefit to State and local law enforcement people that are killed in the line of duty; we have at least processed bills that pay victims of Federal crime—I don't think it has ever run all the route, but we processed it through this committee, I believe—and here, it seems to me, this is a direct Federal fault. The Federal Government has taken a criminal—and obviously, if the problem occurs, a dangerous criminal—and have put him into a community and, in effect, concealed his identity.

I can understand why the Feds have to do that. I was a prosecutor and I know very often you have got to get these people to turn State's evidence to get a bigger fish in the pond. But usually they are not very nice people anyway or they wouldn't be in a position to be a witness in those kinds of things.

So if you're going to do that, and with organized crime you have to protect them, it seems to me at the same time we have to take some responsibility as a Federal Government toward the community in which we inject this person. In these other compensation situations the Federal Government isn't really at fault. It isn't our fault that a police officer gets killed in the line of duty, and it isn't our fault, at least not directly, that somebody is injured by somebody who violates a Federal law.

Here we have actually set the stage, and it seems to me, absent governmental immunity, we would have a common law liability, it would strike me, if we had done exactly the same things without immunity. It seems to me we ought to be more generous than $25,000 for a death.

Senator COCHRAN. I think the Congressman's points are well made. We certainly hope there will be a fund included in the legislation that is reported out of both the Senate committee and the House committee. I thank you for your observations.

Mr. SAWYER. As sad and all as these cases are—and we have heard testimony in the last Congress about kind of a horror story in Colorado. But fortunately, there aren't very many of them. It is unfortunate that there are any, but when we are dealing with compensation, we are not dealing with big numbers like we are with State criminal victims or Federal criminal victims. We're talking about a very small group. So I would think we compound the very small numbers involved with a direct fault in the Federal Government on taking a gamble—and we had to take it, I'm not arguing with that. But that isn't the fault of the person living in Pascagoula, MS, either.

I agree, it's a tough problem, and it is hard to know what the best answers are. I agree with the general outline in the bill, except I think you're too southern conversative with your amount of compensation in this kind of case, because I think this kind of case is few in numbers and therefore few in total dollars, and a clear Federal responsibility.

Senator COCHRAN. You make a very compelling argument for a higher number in that fund, and I certainly couldn't quarrel with anything the Congressman has said. I thank you for that observation.

Mr. SAWYER. Thank you.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. I appreciate my colleague's comments. I would only like to add as an addendum that—and we will get more testimony this morning—that the number may be larger than we think. We're talking about notorious cases, the *Pruett* case and some of the others, but I think Mr. Anderson will testify that of 378 witnesses of whom they have information, 23 percent have been arrested since their admission in the program. That is a fair amount of recidivism or aberrant behavior on the part of witnesses, so it isn't just the occasional notorious case, but 23 percent, almost a quarter of these cases.

Mr. SAWYER. If the gentleman would yield, I would doubt that very many of them would involve death or very serious injury.

Mr. KASTENMEIER. That's true.

Mr. SAWYER. I also think it would have a side effect, that if the Federal authorities supervising this knew they were going to have to pay and account for it and it be their fault, they would be a lot more cooperative and careful about who they put where and how they kept their eye on them.

Mr. KASTENMEIER. The point I guess I was making was that we need be concerned about more than merely death cases. We ought to be concerned about all aberrant behavior resulting in arrest in a community. To that extent, it is a little more widespread than the occasional notorious case.

On behalf of the committee, Thad, we thank you for coming over this morning. We wish you the very best with your bill in the Senate, and we hope we can move something forward that makes sense and will go a long ways to solving or at least helping solve some of the problems.

Senator COCHRAN. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Next the Chair would like to call two witnesses. Our next witnesses represent the Department of Justice, Mr. James Knapp, who is Assistant Attorney General of the Criminal Division. Mr. Knapp has been with the Justice Department for the last 7 months.

Also accompanying Mr. Knapp is Mr. Howard Safir, the Assistant Director of the U.S. Marshals Service. Gentlemen, you are both most welcome.

I will say we have received copies of your written statements late yesterday, so those statements have been given to members this morning and, without objection, they will be made part of the record. I don't know whether the members of the committee have had a chance to look at them yet so we probably would want to hear from you on those statements.

Also, without objection, the statement in full of the Senator from Mississippi will be accepted and made part of the record.

Mr. Knapp.

TESTIMONY OF JAMES I.K. KNAPP, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY GERALD SHUR, ASSOCIATE DIRECTOR, OFFICE OF ENFORCEMENT OPERATIONS; HOWARD SAFIR, ASSISTANT DIRECTOR, U.S. MARSHALS SERVICE

Mr. KNAPP. Thank you, Congressman.

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to appear before you today to discuss H.R. 3086, a bill entitled "United States Marshals Service and Witness Security Reform Act of 1983" and its impact on the Witness Security Program. Sitting behind me today to help answer any questions you may have is Gerald Shur, Associate Director, Office of Enforcement Operations, who administers the program for the Criminal Division.

The bill is divided into two parts. Title I deals with the Witness Security Program—I will be discussing issues concerning title I—and title II deals with the Marshals Service. Mr. Safir here will discuss title II and certain portions of title I in his prepared testimony.

Our basic position is one of support for this legislation, with three exceptions, which will be discussed below.

The Witness Security Program is one of the most effective and important tools in the prosecution of organized criminal conspiracies. Over the years, the program has grown to a structured, multiservice program that seeks not only to assure the security of protected witnesses but also to address the variety of other problems faced by individuals and families who must adopt new identities and relocate to safer areas of the country. In this period of growth, the Attorney General has been called upon to develop special procedures and techniques to deal with the protection and relocation of witnesses.

We believe the program in its present form accords fully with the intent of the 1970 legislation establishing the program. The Department, however, has long supported legislation describing in more detail the authority the Attorney General may exercise in making the program effective. To the extent that title I of this legislation would also accomplish this purpose, we support it.

For example, proposed section 3521(b) emphasizes that the program is not limited to security considerations, but should extend, as it now does, to concerns about the social and psychological difficulties faced by the relocated witness. This section also lists specific services that may be provided. Section 3523 provides guidance in our dealings with State authorities, and section 3524 provides clear authority for the Attorney General to enter into contracts or other agreements to carry out the purposes of the Witness Security Program. The legislation also provides for the active supervision of witnesses who are on State parole or probation by Federal probation officers, a measure which we strongly support.

Despite our support of the foregoing provisions, we believe that this bill should be modified in several key respects because it contains provisions which would significantly and detrimentally alter the program as it is presently administered.

We have three fundamental concerns: first of all, the contract-like language contained in subsection (d)(1)(a) of section 3521 as proposed; second, the delegation provisions of authority which omit reference to the Director and Associate Director of the Office of Enforcement Operations and would, in effect, require the personal involvement of the Assistant Attorney General, Criminal Division in each case; and three, the provisions for judicially ordered disclosure.

First of all, turning to the first problem, section 3521(d)(1)(a), it appears to create a contract between the parties in that there is an exchange, that is, a promise of program services, which includes payment of money by the Government, for the promise to comply with the terms of the agreement including "the agreement of the person, if a witness or a potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings * * *." I have quoted from the bill.

Any compensation for providing testimony, Mr. Chairman, is strictly prohibited by title 18 U.S.C. 201 (h) and (i) right now. We believe this issue is best handled, as we do it now, by a memorandum of understanding, a statement drafted by the Marshals Service detailing the services to be furnished to the witnesss, which the witness signs and acknowledges that he has read and understood.

I will pass over the next portion of my prepared statement, since you have it before you, dealing with the details of it, and turn to the next topic if there is no objection, Mr. Chairman, in order to expedite time.

Mr. KASTENMEIER. Yes.

Mr. KNAPP. Second, we object to the provision in the bill requiring that either the Attorney General, the Associate Attorney General, or Assistant Attorney General in the Criminal Division, sign the agreement. It is appropriate for a representative of the U.S. Marshals Service to sign this document since it is that agency which provides the services described. In addition, the U.S. Marshals Service is a neutral body, free from any prosecutorial concerns. Retaining this authority in the U.S. Marshals Service preserves the integrity of the program, dispelling any implications of a "bargain" for testimony.

We object to section 3521(d)(3). This section omits from the delegation to approve applications for the Witness Security Program the Director and Associate Director of the Office of Enforcement Operations, Criminal Division, who presently exercise the authority to perform this function. We believe this authority should remain where it is, and therefore recommend it be delegated also to the Director and Associate Director of the Office of Enforcement Operations.

The Office of Enforcement Operations was created in the Criminal Division in February 1979, and was assigned sole responsibility for the Division's role in the Witness Security Program. The creation of the Office of Enforcement Operations resulted not only in the centralization of control over admissions to the program, but also in the application of uniform admission criteria. The Office of Enforcement Operations now has the primary authority for determining which witnesses will be assisted in the program. As a result, a tightening up of the admission process and a greater uni-

formity of application of rules now exists over that which occurred prior to the creation of the Office.

The prepared testimony goes through in great detail the current review process which exists. But basically seven people within this office, at four different levels of authority, must review any request, and after considering four separate reports and evaluations. One is by the U.S. attorney himself in the District where the witness is going to testify—and again, I want to point out that the U.S. attorney is a significant and Presidentially-appointed official; two, an analysis by the investigative agency as to the danger to the witness; three, an analysis by the pertinent section in the Criminal Division as to the significance of the case and the need for the witness' testimony in that case; and four, an evaluation by the Marshals Service of the suitability of a particular witness for admission to the program.

If the investigative agency at headquarters determines there is no threat to the witness, the prosecutor's request is denied. If the litigative section determines the case is not important, or that the witness' testimony is not essential, or that the evidence is not sufficient for conviction, the request is denied. If the U.S. Marshals Service determines that the witness is not a suitable candidate for the program and the anticipated problems in relocation are insurmountable, the request is denied. Occasionally authorization is given despite the U.S. Marshals Service objections with the understanding that the authorization is based on the witness' participation in necessary programs such as drug counseling, treatment for alcohol abuse, or psychiatric care.

The delegation of authority to approve Witness Security Program applications as it presently exists has proven effective and efficient. The sharp decline in the usage of the program since the Office of Enforcement Operations was created is the direct result of the efforts of the Director and Associate Director to carefully screen applications. The Witness Security Program was developed in 1970. In 1971, 92 witnesses were protected. From 1975 through 1977, an average of 450 new witnesses entered the program each year. In February 1979, the Office of Enforcement Operations was created to administer the program and program entries decreased significantly. Better screening ensued.

In fiscal year 1980 there were 315 entries into the program, and in fiscal year 1981 there were 260, and in fiscal year 1982, 300. In the first 8 months of fiscal year 1983, 200 persons have been placed in the Witness Security Program, so it looks like we're going to come out about the same as we did in 1982.

In addition, the monitoring of admissions by the Office of Enforcement Operations has resulted in a significant upgrading of the prosecutions for which witnesses are placed in the program and an increased certainty that there is no other alternative to ensure the witness' safety at that time.

As written, proposed subsection (d)(3) would place an extraordinary burden on persons who are charged with a great many responsibilities. My specific concern is the Assistant Attorney General in the Criminal Division. As a practical matter, to conscientiously review—You can figure there is an average of two requests per work day coming in, and to conscientiously review each request,

you could figure close to an hour at least to review all the reports involved at a minimum. That is about 2 hours a work day being devoted just to this aspect of the duties of the Assistant Attorney General of the Criminal Division. We believe that is an undue burden to place on any individual who has a great deal of responsibility.

This designation would not just be burdensome to him, but would result in some disadvantages to the operation of the program. In many cases, time is a crucial factor. Applications must be processed quickly. The volume of witness security requests would be unduly burdensome on the designees and the new narcotics task forces will cause increased use of the program. To ask persons already charged with a high level of responsibility to add a task of this nature, and to bypass an office which already has experience and responsibility in this area, is not prudent.

Further complications arise in the absence or unavailability of the designee who is already overburdened with sufficient real time problems, which includes the approval of wire tap requests.

Turning finally to the third issue of which we have concern, subsection (f)(2) of 3521 provides for judicial review of the Attorney General's decision not to disclose the whereabouts of a particular witness to a judgment creditor. I'm on page 10 now.

We oppose this provision because we believe that it could open the door for unnecessary and costly litigation against the United States. An unwarranted judicial decision could needlessly endanger a witness' life.

Let me suggest an alternative approach. First, a recently authorized procedure within the Department would continue and simply be put in the bill, under which the Associate Attorney General could direct the Marshals Service to disclose the location of the witness to legitimate judgment creditors in the event the witness willfully refused to pay a legitimate debt. Second, a statute could provide for the use of a court-appointed master to enforce a judgment where the Associate Attorney General determines there would be undue danger to the witness if his address was disclosed directly to the creditor. The master would be furnished with all necessary powers. This approval would require the Attorney General to divulge the witness' location only to the master and not to a third party.

Mr. Chairman, I hope you will consider these comments and suggestions. We will be glad to work with you on this bill. I will be pleased to answer any qustions you have, either now or at the conclusion of Mr. Safir's testimony.

[The statement of Mr. Knapp follows:]

STATEMENT OF JAMES I.K. KNAPP, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. Chairman I appreciate this opportunity to appear before the Subcommittee today to discuss H.R. 3086, a bill entitled. "United States Marshals Service and Witness Security Reform Act of 1983" and its impact on the Witness Security Program. With me here today is Gerald Shur, Associate Director, Office of Enforcement Operations who administers the Program for the Criminal Division.

The bill is divided into two parts. Title I deals with the Witness Security Program and Title II deals with the Marshals Service. The comments contained in this state-

ment concern Title I. Our basic position is one of support for this legislation, with three significant exceptions which will be discussed below.

The Witness Security Program is one of the most effective and most important tools in the prosecution of organized criminal conspiracies. Over the years, the Program has grown to a structured, multi-service program that seeks not only to assure the security of protected witnesses but also to address the variety of other problems faced by individuals and families who must adopt new identities and relocate to safer areas of the country. In this period of growth, the Attorney General has been called upon to develop special procedures and techniques to deal with the protection and relocation of witnesses.

We believe that the Program in its present form accords fully with the intent of the 1970 legislation establishing the Program (Title V of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 933). The Department, however, has long supported legislation describing in more detail the authority the Attorney General may exercise in making the Program effective. To the extent that Title I of this legislation would also accomplish this purpose, we support it. For example, proposed section 3521(b) emphasizes that the Program is not limited to security considerations, but should extend—as it now does—to concerns about the social and psychological difficulties faced by the relocated witness. This section also lists specific services that may be provided. Section 3523 provides guidance in our dealings with State authorities, and proposed section 3524 provides clear authority for the Attorney General to enter into contracts or other agreements to carry out the purposes of the Witness Security Program. The legislation also provides for the active supervision of witnesses who are on state parole or probation by federal probation officers, a measure which we strongly support.

Despite our support of the foregoing provisions, we believe that this bill should be modified in several key respects because it contains provisions which would significantly and detrimentally alter the Witness Security Program. We have three fundamental concerns: (1) the contract-like language contained in Section 3521(d)(1)(a); (2) the delegation provisions which omit reference to the Director and Associate Director of the Office of Enforcement Operations; and (3) the provisions for judicially ordered disclosure.

We oppose Section 3521(d)(1)(a), because it appears to create a contract between the parties in that there is an exchange, i.e., the promise of Program services, which includes payment of money, by the government for the promise to comply with the terms of the agreement including "the agreement of the person, if a witness or a potential witness, to testify in and provide information to all appropriate proceedings . . ." Any compensation for providing testimony is strictly prohibited by Title 18 U.S.C. 201(h) and (i). This issue is now handled by a Memorandum of Understanding, a statement drafted by the Marshals Service detailing the services to be furnished to the witness, which the witness signs and acknowledges that he has read and understood.

Section 3521(d)(1)(a) is clearly a departure from the language presently contained in the Memorandum of Understanding which states: ". . . This memorandum is not a contract or an agreement to provide protection or maintenance assistance to the witness in return for testimony . . ." This language is designed to emphasize that there is not an exchange of money for testimony.

The relationship between the government and the witness is not contractual. Participation in the Program is voluntary, and acceptance in the Program is within the discretion of the Attorney General. The services provided by the government to a witness are not a payment to the witness for this testimony, as they would appear to be in this bill. These services are a means of providing protection against the danger created by the witness carrying out the obligation of all our citizens to testify in court concerning the commission of a crime.

We believe the Memorandum of Understanding now in use is sufficient for our needs. We object to the provision in the bill requiring that either the Attorney General, the Associate Attorney General, or Assistant Attorney General, Criminal Division, sign the agreement. It is appropriate for a representative of the United States Marshals Service to sign this document since it is that agency which provides the services described. In addition, the United States Marshals Service is a neutral body, free from any prosecutorial concerns. Retaining this authority in the United States Marshals Service preserves the integrity of the Program, dispelling any implications of a "bargain."

We also object to Section 3521(d)(3). This Section omits from the delegation to approve applications for the Witness Security Program the Director and Associate Director of the Office of Enforcement Operations, Criminal Division, who presently exercise the authority to perform this function. We believe that this authority should

remain where it is, and therefore recommend that it be delegated also to the Director and Associate Director of the Office of Enforcement Operations.

The Office of Enforcement Operations was created in the Criminal Division in February 1979, and was assigned sole responsibility for the Division's role in the Witness Security Program. The creation of the Office of Enforcement Operations resulted not only in the centralization of control over admissions to the Program, but also in the application of uniform admission criteria. The Office of Enforcement Operations now has the primary authority for determining which witnesses will be assisted in the Program. As a result, a tightening up of the admission process and a greater uniformity of application of rules now exists over that which occurred prior to the creation of the office.

The initial application to use the Program is submitted by the United States Attorney, the chief federal law enforcement officer in the judicial district. The Office of Enforcement Operations has implemented the use of the Witness Security Program Application Form, which requires the prosecutor to submit very specific and detailed information about the significance of the case, the prospective defendants, the witness' testimony, and the anticipated benefits of successful prosecution. The Office of Enforcement Operations forwards a copy of the prosecutor's application to the appropriate litigative section in the Criminal Division, where it is reviewed for significance of prosecution, significance of defendants in light of their criminal activity, and the significance of the witness' testimony.

In addition, the investigative agency involved submits to its headquarters a report detailing the threat to the witness and describing the need to use the Program. Agency-headquarters reviews the report and forwards it, along with the headquarters' recommendation, to the Office of Enforcement Operations. In the Federal Bureau of Investigation, four people actually review the report, including the Chief of the Organized Crime Intelligence Unit and the headquarters case supervisor.

While these two independent reviews are being conducted, the United States Marshals Service interviews the witness and the adult members of the household to ensure that the witness understands what the Program can and cannot do and to identify any problems which may arise in the relocation process. In addition, the witness is advised to obey all laws and to comply with all regulations of the Program or risk being terminated from the Program. This report is reviewed by five people at the United States Marshals Service headquarters. The United States Marshals Service then forwards a copy of this preliminary interview report to the Office of Enforcement Operations, along with its recommendations concerning the witness' suitability for the Program.

When this process is completed, seven people in the Office of Enforcement Operations review and consider all four reports before making a decision. If the investigative agency headquarters determines there is no threat to the witness, the prosecutor's request is denied. If the litigative section determines the case is not important, or that the witness' testimony is not essential, or that the evidence is not sufficient for conviction, the request is denied. If the United States Marshals Service determines that the witness is not a suitable candidate for the Program and the anticipate problems in relocation are insurmountable, the request is denied. Occasionally, authorization is given despite the United States Marshals Service objections with the understanding that the authorization is based on the witness' participation in necessary programs such as drug counseling, treatment for alcohol abuse, or psychiatric care.

The delegation of authority to approve Witness Security Program applications as it presently exists has proven effective and efficient. The sharp decline in the usage of the Program since the Office of Enforcement Operations was created is the direct result of the efforts of the Director and Associate Director to carefully screen applications. The Witness Security Program was developed in 1970. In 1971, 92 witnesses were protected. From 1975 through 1977, an average of 450 new witnesses entered the Program each year. In February, 1979, the Office of Enforcement Operations was created to administer the Program and Program entries decreased significantly. In FY 1980, there were 315 entries into the Program. In FY 1981, there were 260 and in FY 1982, 300. In the first 8 months of FY 1983, 200 persons have been placed in the Witness Security Program. In addition, monitoring of admissions by the Office of Enforcement Operation has resulted in a significant upgrading of the prosecutions for which witnesses are placed in the Program and an increased certainty that there is no other alternative to ensure the witness' safety at that time.

As written, Section 3521(d)(3) places an extraordinary burden on persons who are charged with a great many responsibilities. This designation to approve Witness Security Program applications would not just be burdensome to the named designees, but would result in some disadvantage to the operation of the Program. In many

cases time is a crucial factor and applications must be processed very quickly. Additionally, the volume of witness security requests would be unduly burdensome on the designees, and the new Narcotics Task Forces will cause increased use of the Program. To ask persons already charged with a high level of responsibility to add a task of this nature, and to by-pass an office which is charged with the responsibility of the day to day administration and coordination of the Witness Security Program, is not prudent. Further complications arise in the absence or unavailability of the designee who is already overburdened with sufficient real time problems (i.e. wire taps).

Section (f)(1) of 3521 provides for the resolution of civil matters involving relocated witnesses. This section requires the Attorney General to accept service of process for the witness, make a return of service to the plaintiff, and assert the intentions of the witness in response to the judgment.

Acceptance of service of process by the Attorney General for the witness would create an agency relationship which should be clearly limited to service of process. However, it should not be in the province of the Attorney General to convey to the plaintiff the intentions of the witness regarding compliance with the judgment. Instead, it is suggested that the following language provides sufficient safeguards to the plaintiff.

. . . If a judgment in such action is entered against that person, the Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the person has not complied with the judgment within a reasonable time, the Attorney General shall, after considering the danger to the person and whether the person has the ability to respond to the judgment, (1) disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment and/or (2) direct the person to take such action in accordance with the judgment as the Attorney General determines is appropriate.[1]

Section 3521 (f)(2) provides for judicial review of the Attorney General's disclosure decision. We oppose this provision because we believe that it could open the door for unnecessary and costly litigation against the United States. An unwarranted judicial decision could needlessly endanger a witness' life.

We recommend an alternative approach. First, a recently authorized procedure would continue under which the Associate Attorney General would direct the Marshals Service to disclose the location of the witness to legitimate judgment creditors in the event that the witness willfully refused to pay a legitimate debt. Second, a statute could provide for the use of a court appointed master to enforce judgment where the Associate Attorney General determines there would be undue danger to the witness if his address was disclosed to creditors. The master would be furnished with all necessary powers. This approval would require the Attorney General to divulge the witness' location only to the master and not to a third party.

We believe this approach should be given a chance to work before the Pandora's box of judicially ordered disclosure is opened.

I hope you will consider these comments and suggestions and I appreciate the opoportunity to present them. We will be pleased to answer any questions the Subcommittee may have.

Mr. KASTENMEIER. Thank you very much, Mr. Knapp.

Let's proceed with Mr. Safir. Your testimony is not that extensive, I take it.

Mr. SAFIR. Mr. Chairman, I appreciate this opportunity to appear before the subcommittee to discuss the provisions of H.R. 3086, entitled "The United States Marshals Service and the Witness Security Reform Act of 1983."

Let me just state, which is not in the text, that as of today there are 4,229 principal witnesses in the Witness Security Program, and with family members, that equals a community of about 13,000 individuals that have been relocated by the Marshals Service in the 13 years that the program has been in operation.

With relatively few exceptions, the Marshals Service fully supports this legislation and its intent to clarify and codify existing program policies and procedures. The Service feels that the Wit-

[1] S. 474, 98th Congress, 1st session

ness Security Program in its present form and the legislation under discussion here today comply fully with the intent of the Organized Crime Control Act of 1970 which formally established the program 13 years ago.

Additionally, the proposed legislation recognizes the necessity of providing other services beyond just basic physical security which have also been of concern to the Marshals Service in administering this extraordinary program over the years.

The Witness Security Program is truly a program without precedence. Since the program's inception, the Department as a whole, and specifically, the Marshals Service, have been tasked to establish unique procedures which provide not only for the security of the witness but the complete reconstruction of his life style and that of his family, and at the same time balance the requirement to protect his relocation community and society at large. The legislation proposed by this subcommittee seeks to address both of these areas of responsibility.

In its present form, the proposed legislation allows the Attorney General the latitude and flexibility necessary to provide for the specific needs of individual cases. One aspect of the program which has remained constant throughout its 13-year history is the occurrence of distinct and unique situations. Without this flexibility, the Department and the Service would most definitely be at a disadvantage in successfully protecting witnesses and, consequently, in prosecuting significant organized crime figures.

The proposed act codifies procedures already initiated by the Marshals Service. For example, it has always been the policy and the practice of the Marshals Service to cooperate fully with any legitimate law enforcement investigation into the possible criminal activities of program participants. While the Service does have a responsibility to maintain a witness' security, it does not do so at the expense of a bona fide investigation. In fact, the Service responds to all official requests for relevant information. To that end, the Marshals Service has provided the Federal Bureau of Investigation with the names, former and new, and all necessary indentifying information of all adult program participants to enable the FBI to respond in both a secure and timely fashion to inquiries from other law enforcement agencies conducting criminal investigations.

While the Service cooperates with any legitimate law enforcement investigation concerning a relocated witness, it also seeks to predict the possibility of antisocial behavior and initiate measures to quash it. To that end, the Marshals Service contracted in the spring of 1982 with a team of psychologists, all of whom have had vast experience in counseling and assessing individuals who had made difficult relocations under stressful conditions. This evaluation process is extended to all program candidates recently released from prison and to those with an extensive history of violence or suicide attempts. To date, 127 individuals have been evaluated under this procedure. As a result of these indepth psychological evaluations, the Service has been able to require psychiatric treatment and supervised State probation as a condition of program participation in those cases where such requirements were deemed necessary.

In connection with the subcommittee's concern that all possible measures be taken to protect society from unnecessary violence, the Marshals Service fully supports section 102, which requires that all State parolees and probationers be actively supervised by Federal probation officers. It has long been the opinion of the Service that all parolees and probationers should be supervised. In the absence of this Federal provision, it has been necessary to negotiate reciprocal supervision agreements between the State court of jurisdiction in the danger area and the State probation authorities in the relocation area. Satisfactory arrangements were not always feasible. This Federal provision will afford necessary attention to the State probationer/parolee's behavior and hopefully reduce the possibility of harm to the new community.

The Marshals Service does feel, however, that certain provisions of the proposed Reform Act should be modified so as to conform with present program procedures which the Service feels are presently adequate from the aspect of bother operational effectiveness and administrative efficiency. The Service believes that the authority to enter into an agreement with the witness and his family should remain with the Marshals Service. It is impractical to allow only the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General this authority. Such restrictions would only cause inordinate delays and would provide no additional program benefits.

At present, when a witness enters the program, he enters into a very detailed written memorandum of understanding which fully delineates those services the witness can expect from the Marshals Service and those precautions and duties the Marshals Service expects from the witness. The Marshals Service supports any further conditions or restrictions the Department may wish to place on the witness' participation in the program, but feels that any such provisions should be incorporated into the existing memorandum of understanding executed by the Marshals Service. Inasmuch as it is the responsibility of the Marshals Service to provide these services, it is preferable that it also be the responsibility of the Marshals Service to enter into the agreement with the witness.

Additionally, the Marshals Service is an impartial body, not influenced by prosecutorial considerations. The Service understands that it may be the subcommittee's intent that by insisting this responsibility be elevated to the higher levels of departmental review, that stricter admission requirements would ensue. It has been my personal experience, as first the Chief of Witness Security for 1½ years, and subsequently as the Assistant Director for Operations, overseeing the Witness Security Program for the past 4 years, that the higher levels of the Department have been keenly aware of and closely involved in the program and its operation.

Since the creation of the Office of Enforcement Operations and with it the centralization of the admission authority, I feel it is accurate to say that the quality of the incoming witness and the seriousness of the existing threat to that witness have been more closely scrutinized. The results of the present admission procedure is most adequate and is certainly borne out in the increased conviction rate brought about by protected witnesses' testimony, which is approximately 78 percent.

Sections (f)(1) through (2)(b) address the resolution of civil actions and, most specifically, judgments against relocated witnesses. It has long been the opinion of the Marshals Service that program participants should not be allowed to use the program as a shield from their obligations by virtue of their relocation and new identity. Since 1978, the Witness Security Division has sought to assist creditors in enforcing their claims against program participants through the service of process and giving notice to the creditor that such process has been served.

The Service supports the Department's recommendation that current procedures continue in those cases where a recalcitrant witness refused to comply with a judgment despite the Service's efforts to the contrary. These present provisions allow the Marshals Service, with the concurrence of the Department, to disclose a witness' relocation area and new identity to a creditor to enable the creditor to pursue legal action in the relocation area. In those cases where it is determined by the Department that disclosure would subject the witness to undue danger, a master would be appointed by the court to pursue the creditor's interest without disclosing the witness new identity and relocation area.

Section 3523(b) addresses the State government's responsibility to assist the Attorney General in the provision of protection for witnesses in State prosecution. The Marshals Service strongly urges the subcommittee to include language which would require the States to assist the Attorney General and the Marshals Service in the provision of necessary documentation papers for all program participants, whether they are testifying at the behest of State prosecutors or not.

Additional language could hold the State harmless from any criminal or civil liability as a result of its cooperation with the Attorney General. At present, 14 State registrars feel that it is contrary to their State statutes to assist the Marshals Service in the provision of birth certificates. The majority of these same registrars are willing to assist the Service, but feel they cannot because they lack statutory authority. Unfortunately, without this necessary documentation, the witness' assimilation into the new community and often that of his children is significantly hampered.

Title II of the bill addresses the overall operation and statutory responsibilities of the U.S. Marshals Service. Section 1921(e) provides the Marshals Service with the authority to credit to its appropriation fees collected as a result of the service of process. The Service urges the subcommittee to revise this language as follows:

(e) Notwithstanding any provisions of United States law, the United States Marshals Service is authorized to the extent provided in the Appropriations Act to credit to its appropriation account all fees, commissions and net proceeds arising from or collected for the service of process, including complaints summonses, subpoenas, judicial executions, seizures, levying and similar processes served by the United States Marshals Service and to use such credited amounts for the purpose of carrying out such activities and to be carried over year to year for such purposes.

This additional language would better equip the Marshals Service in effectively executing a national forfeiture program.

The Marshals Service very much appreciates this opportunity to comment on this important legislation and thanks the subcommi-

tee and its staff for their continued interest and support of the Marshals Service and the Witness Security Program.

I would be pleased to answer any questions you may have.

Mr. KASTENMEIER. Thank you, Mr. Safir.

One of the questions, of course, if fixing responsibility in the language, who's responsible. For example, just hypothetically, Heaven forbid, there is another rash of killings by several protected witnesses and the Congress desires to call in persons to ask them about how the judgment was made as to how these persons were accepted and located as they were. Whom would you suggest we call in, Mr. Knapp?

Mr. KNAPP. Well, the Associate Attorney General or the Assistant or Deputy Assistant like myself are in a position to be briefed on a specific issue and answer questions. Certainly in an oversight capacity, though, it is appropriate to call in the Associate Director himself. He has testified before, and he can answer questions on a specific incident or——

Mr. KASTENMEIER. Would you have known about or participated in the decision, let's say, with such witnesses as far as relocation of such witnesses, or would that have been done entirely presently by the Director and Assistant Director of the U.S. Marshals Service in charge of that activity?

Mr. KNAPP. No, I would not be involved in the current procedures, unless there was a controversy or problem. If there really was a genuine controversy—difference of opinion—then I would become involved in the matter, or the Assistant Attorney General or even the Associate Attorney General could conceivably become involved.

Mr. KASTENMEIER. I want to make sure I have the nomenclature right. You have referred to the fact that the delegation provisions omit reference to the Director and Associate Director of the Office of Enforcement Operations. Is that within the Marshals Service or the Justice Department?

Mr. KNAPP. The Criminal Division of the Justice Department.

Mr. KASTENMEIER. So you accept the fact that the responsibility should go to the Justice Department, but you would merely add two additional persons to be designated as possible——

Mr. KNAPP [continuing]. Authorizing officials, yes, sir.

Mr. KASTENMEIER. There is also some question of current monitoring that goes on, and the tone of the testimony seems to conflict with the quotation. In an earlier hearing the Justice Department claimed it was improving its treatment of individuals with judgments against protected witnesses. The Fairfax Press contained a story, and when asked for a response, a Justice Department spokesman is quoted as follows: "Mr. Howard Safir of the Marshals Service stressed that the U.S. Marshals Service has no custodial relationship with members of the Witness Protection Program. 'We can't force them to pay their bills or do anything,' Safir said. 'They are free and out on the street.' "—which may be technically correct, but it does suggest the monitoring of supervison of these witnesses is either nonexistent or pretty loose.

Mr. SAFIR. If I may address that, Mr. Chairman.

Mr. KASTENMEIER. Yes.

Mr. SAFIR. First, as is often the case, the portion of an interview that is reported in the press is not necessarily the entire context of what was told to the reporter. What I did tell that reporter was that we do feel a responsibility to those citizens who are harmed by witnesses and that we would, within the limitations of what we can legally do, require those witnesses to either pay their debts or to make restitution for damage that they have done.

In the instant case that you refer to, the damage was done prior to the witness' entering the Witness Protection Program. When we found out about it we contacted the witnesses and the witnesses indicated to us that they would, in fact, through a secure manner, through us, make arrangements to pay for those damages.

Second, as I think you are aware, the Department has issued a policy that says when we notify a witness he has a legal obligation and he refuses to pay it, the Marshals Service can recommend and the Criminal Division can approve disclosing the location of that witness to the aggrieved party. So I think the reporter took a great deal out of context and we are very concerned with damage done by witnesses to a citizen.

Mr. KASTENMEIER. Well, without pressing that further, I will say I think with respect to procedural provisions we can probably work something out that will be satisfactory to both the purposes of the legislation and to the Department. I would think we could.

I note, Mr. Knapp, there is no mention made of one provision in the bill relating to witness compensation. Do I understand that is sort of tacit acceptance of that provision, or has the Department not really formed a conclusion about it?

Mr. KNAPP. I think we are agreed in principle that it is a good idea. I think perhaps you may have to do some work as to how this is going to be funded. The fine money may not be adequate from what I understand. In principle, we are agreed to the idea.

Mr. KASTENMEIER. I also find no comment on the provisions of the bills which go to merit selection for the Marshals Service. Do I understand that that is favored or not favored?

Mr. SAFIR. Director Hall has testified before you, Mr. Chairman, and it is certainly his opinion and my opinion that merit selection of marshals is an extremely desirable thing to professionalize the Service.

Mr. KNAPP. I should add the administration hasn't reached any final decision on this. It is under review.

Mr. KASTENMEIER. Yes, I am aware that Mr. Hall has strongly supported merit selection for the Marshals Service, and I realize the Department has—well, I gather at this point has not determinatively reached a decision.

Mr. KNAPP. That's correct.

Mr. KASTENMEIER. I would like to yield to my colleagues.

The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. Thank you very much, Mr. Chairman.

Mr. Knapp, first let me say that from my perspective it is clear that this Witness Security Program is certainly necessary. It's a question of making some steps in the legislation that needs to be done.

I would like—I see we have a vote—in the brief time I have to ask a couple of questions as far as the relationship between this program and the local law enforcement agencies.

Do you have any guidelines that you follow in regard to—let me just start with a specific example. Let's say there is pending in a State or local jurisdiction charges against a person who you want to put in your witness protection program. What is your policy in that regard?

Mr. KNAPP. Well, there are two separate considerations involved. He could be put in the witness protection program conceivably, but the charges would still be prosecuted.

Mr. DEWINE. I understand that. But what about his availability for trial?

Mr. KNAPP. We would see that he was made available.

Mr. DEWINE. Is that a standard policy?

Mr. KNAPP. Yes.

Mr. DEWINE. So if a local county prosecutor was told by a Federal official that it doesn't make any difference what you do because you're not going to find him in 2 months anyway, that would not be the normal policy?

Mr. KNAPP. That would not be the normal policy. And if such an incident occurred, we would certainly want it brought to our attention.

Mr. DEWINE. You touched upon this briefly in your testimony. What is your current policy now in regard to someone who is on probation or parole? You touched upon the bill, but what is your policy now? Let's say they're on probation and parole from a State. How are they dealt with, or are they dealt with in any particular special manner once they enter your program?

Let's say when they enter the program they are already on probation or parole.

Mr. SAFIR. If I may answer the question, our policy is that if a witness is on supervised probation or parole when he is submitted for entry into the program, we require that he be supervised in his relocation area. We seek to relocate him to a State where through the interstate compact the probation office in his home State and in the danger area and the relocation area will work out an agreement to have him supervised. We advise him that he has to give up a little bit of his security in that manner because the probation officer will know who he is. But he is supervised.

We tell the States that if they cannot let him come in on unsupervised parole, he is going to have to be supervised or he can't come into the program.

Mr. DEWINE. Say that again, that last statement?

Mr. SAFIR. In other words, we tell the States we do not want them changing his probation or parole status for entry into the program. If he needs to be supervised, we want him supervised when he is in the program.

Mr. DEWINE. And what you're telling me is, when he goes to this new State—are you telling me you don't relocate him there unless you already have him placed and an agreement with that State?

Mr. SAFIR. That's correct.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Mr. Knapp, with regard to the compensation program deals primarily with the source of funding, but that you agree we should have one?

Mr. KNAPP. That's correct.

Mr. FRANK. The one question I would have then deals with the objection you had to the bill the chairman has presented in terms of judgments in civil suits. You are saying you want the case in dispute to go to a master. What happens then? What is the master empowered to do?

Mr. KNAPP. Whatever a court could normally do. The master would be told the person's address and location, and his local official could go out and levy on the person's property or whatever that would carry out the judgment.

Mr. FRANK. What, then, are the differences in what the master does and what the judge would do?

Mr. KNAPP. The difference is that the creditor himself would not have knowledge of the witness' location and address. Only the master would. So there would be less risk of the information of his location being released to the general public.

Mr. FRANK. And the master would have full powers to enforce the judgment?

Mr. KNAPP. Yes.

Mr. FRANK. What do we do about the child visitation cases, where it is not simply going and getting money, but where a parent has lost, because of the witness protection program, the rights to visit a child?

Mr. KNAPP. We try and work those things out between the parties. We are playing a more active role in trying to work these things out so that they do have the right of visitation.

Mr. FRANK. You say work them out between the parties. If a parent has been granted by a court a visitation right, what's to work out?

Mr. KNAPP. Well, the circumstances under which the visitation would occur. We would want——

Mr. FRANK. But you would guarantee that they would occur?

Mr. KNAPP. If it's at all possible, yes.

Mr. FRANK. No, no. If the parent of the child is alive, it's possible.

Mr. KNAPP. Right. Well, without causing any risk of disclosure to either the childrens——

Mr. FRANK. Well, that's a big question-begger. I mean, I don't know how secure 8-year-olds are. In practice, I am not sure—that sounds to me like no visitation rights in an awful lot of cases.

Mr. KNAPP. We are working things out. Maybe Howard can——

Mr. FRANK. I wonder how many cases this comes up in and what is the percentage——

Mr. SAFIR. It comes up in a great many cases. It seems that a good number of the types of individuals who come into the witness protection program have multiple marriages and there are many custody problems.

What we are doing at the present, we are trying to set a fair and reasonable standard for visitation. The answer to your question is,

if the local domestic court orders that the remaining parent, the one who does not come into the program, have twice-a-week visitation rights, it is physically and fiscally impossible for us to do that in each and every case. What we are going to try to do, and what we have done in many cases in the past, is set up neutral site visitations where we bring the witness to a neutral location and the children to a neutral location——

Mr. FRANK. How frequently?

Mr. SAFIR. We are talking about, although we have not finalized it, a monthly visitation.

Mr. FRANK. Let me say the fiscal limitations don't argue very strongly to me. We have decided, for the benefit of society, to take away from a parent rights that they might otherwise have had, or at least that would be the effect of putting fiscal limitations on the court's visitation rights.

The nonparticipating parent is certainly no wrongdoer, and I would think that is a cost we ought to be willing to bear. For society to say "Sorry, but in the interest of fighting crime we need your kid", or you're supposed to see your kid once a week and you can only do it once a month, it's just intolerable.

To do that, I would like to know how much it might cost you. But it would seem to me, in terms of some of the other costs we're talking about, it would be a small one.

If the witness protection program is justified, as I am inclined to believe it is from the standpoint of law enforcement, then the price of enforcing parents' rights to see their children ought to be one that this society willingly bears. I don't think we ought to be nickel and diming the nonparticipating parent.

Mr. SAFIR. I don't disagree with you.

Mr. FRANK. Well, a once-a-month visitation right is a disagreement, in fact, and I don't think it is adequate.

I would also be interested if there are any cases where you say there is no visitation rights at all.

Mr. SAFIR. I think we have in the past, based on disputes between the parents and what we have tried to do in those cases was to get the parent in the relocation area to litigate that back in domestic court and bring the——

Mr. FRANK. We have to break.

Mr. KASTENMEIER. Yes, I must break in at this point. There is a vote on the floor on the rule on transportation bills, and with the indulgence of our two witnesses, we will recess for 10 minutes.

[Whereupon, the subcommittee was in recess.]

Mr. KASTENMEIER. The committee will resume sitting. When we recessed 10 minutes ago, the gentleman from Massachusetts was questioning the witnesses.

Mr. FRANK. I had two questions. First, how many people with custody disputes are in the program now, approximately?

Mr. SAFIR. I could submit that for the record. I don't have it offhand.

Mr. FRANK. Well, an order of magnitude. A hundred, a thousand?

Mr. SAFIR. I would say we probably have a hundred or more.

Mr. FRANK. The amount of money involved in providing transportation to a neutral site for visits—I don't even know why it has

to be neutral sites. What danger is there in bringing the child to the home of the nonparticipating parent?

Mr. SAFIR. It could be substantial, based on retaliation——

Mr. FRANK. The cost here, where we're talking about 200 or 300 people, the cost of transplanting those children would not be, I hope, a factor in the rights.

Second, I would hope there would be no cases where the nonparticipating parent would get no visitation rights. Are there any now, to your knowledge, where there is a clearly established right judicially? If you say you work it out. If I have a court order that says I can see the kid and you say I can't, I don't know what there is to work out.

Mr. SAFIR. I am unaware at this moment of any cases in which we are negotiating with the remaining parent.

Mr. FRANK. What are you negotiating? Where or whether?

Mr. SAFIR. Where the security requirements, the frequency——

Mr. FRANK. You don't negotiate security requirements. I assume you make those.

Mr. SAFIR. In spite of my statement about fiscal requirements, let me say that the Service has no problem with expending the funds. The question is whether or not the funds have been provided.

Mr. FRANK. I would ask you, if you would submit to us, what you think it would take to give the nonparticipating parent the visitation rights they need in dollar terms, so that we could at least address that question about whether or not there should be constraints, and I would also like to know if there were any cases where there were no rights. Are there cases where the parent has a court order giving that parent visitation rights and you're still negotiating whether or not they should be validated rather than the details of it?

Mr. SAFIR. We assume the validity of the court order.

In some cases the remaining parents do not give us the ability in a secure manner to comply with the court order. It is in those cases—far. How so? What does that mean?

Mr. SAFIR. A parent may say, I only want my child to visit me in my home where he lived before with the endangered parent. If we had information to the effect that that child would be harmed, we could not comply with that.

Mr. FRANK. But if the parent is willing to comply with your reasonable security request, you would in all cases comply with the visitation order?

Mr. SAFIR. We have not in the past——

Mr. FRANK. That's one of the reasons the program got a bad name, more than it should have, and I hope——

Mr. SAFIR. We have none in the past, however, and there are none that I'm aware of where we are not now.

Mr. FRANK. As a matter of policy, could I assume there will not be in the future, assuming a willingness to comply with the security requirements, and if we were funding it there would be no interference with court ordered visitation rights?

Mr. SAFIR. Without giving you a total blanket yes to that, let me say that, in principle, I don't think there is any problem with it.

Mr. FRANK. Let me ask the Justice Department what there view is on this from a policy standpoint.

Mr. KNAPP. The same. We will make every effort, provided the requesting parent is willing to cooperate with necessary security arrangements, to accommodate reasonable visitation requests.

Mr. FRANK. If the requesting parent is willing to comply with reasonable security requests, what possible reason would there be not to grant the rights?

Mr. KNAPP. The only concern would be the frequency, depending on the circumstances, of the two parents involved, as well as the two locations in question.

Mr. FRANK. But you're saying there would be some visitation rights?

Mr. KNAPP. Oh, yes.

Mr. FRANK. In every case?

Mr. KNAPP. In every case.

Mr. FRANK. Then I would repeat my request, that I think this is something which we should—I don't understand how we can talk about respect for family and parent-child relationships and then say, as a matter of Government policy, because we're not willing to spend another couple of million dollars you can't see your child very often. That seems to be intolerable.

Mr. KNAPP. Certainly I, as a father, in that situation myself am strongly sympathetic, and we certainly do believe in frequent visitation rights. We are certainly very sympathetic with parents who find themselves in this situation.

Mr. FRANK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. I was interested in the line of questioning of the gentleman from Massachusetts because I think it is relevant and is one of the things that should be effected in one form or the other in the legislation.

I would think that when, at the point a decision is made, as a general rule, that a witness be entered into a program which involves his relocation, and possibly an alias, that an inventory obviously be made of all the other persons affected—whether these be creditors or persons with visitation rights—and I would think it would be a situation where those people would be made whole. They're innocent and obviously they have the benefit of having in many cases court orders stating what their rights are, that the people entering the program would be wholly subject to the rights of others.

I would think one of the judgments ought to be can we offer this witness real security, and if we cannot, maybe we shouldn't enter him in the program. In any event, this is a the moment an imperfect way of proceeding.

I yield to the gentleman from Michigan.

Mr. SAWYER. Thank you.

I am curious. How many protected witnesses in the program have been killed or assaulted despite the program?

Mr. KNAPP. None who have complied with the requirements of the program. The only deaths that have resulted have been people who have violated requirements of the program, like leaving the relocated area and returning to the danger area. I believe that's correct.

Mr. SAFIR. That is correct.

Mr. SAWYER. How many of those?

Mr. SAFIR. I think our most recent list—and I will submit data for the record—is 15 or 16 who have been murdered. But in those cases it was a result of a breach of security, where they had gotten engaged in new criminal activity. We are unaware of any that were killed as a result of their testimony.

Mr. SAWYER. How many of those that are in the program have killed or wounded someone else while they're in the program?

Mr. SAFIR. I will have to submit that for the record, but I believe it is approximately six.

Mr. SAWYER. How many have committed felonies, let's say, in the areas in which they have been relocated?

Mr. SAFIR. Again, I will submit that specifically for the record. But our study showed that 17 percent of the witnesses relocated do go on to commit new crimes.

Mr. KNAPP. Which I might add, Congressman, is well below the average rate for most probationers and parolees.

Mr. SAWYER. Have any of those, other than the approximately six that committed murders, have any of those resulted in serious bodily injury, and if so, about how many?

Mr. SAFIR. Again, I would have to submit that for the record. But there are some, Congressman, yes.

Mr. SAWYER. Like what?

Mr. SAFIR. We have had some witnesses commit some significant assaults upon people that have seriously injured them.

Mr. SAWYER. Do you have any approximation of the numbers?

Mr. SAFIR. I don't, but it's a relatively low number, although any assault concerns us.

Mr. SAWYER. How do you feel about compensation for those that are injured by these kind of things.

Mr. SAFIR. I personally feel that the principle of compensating victims, not only of witnesses but of any criminals, is a good idea. I personally feel there is a real question on whether there is a nexus between continued criminal activity by people in the witness program and the witness program. It is my belief that people who have a history of criminal behavior activity commit new crimes not because they're in the witness program, but——

Mr. SAWYER. I would have no problem with that. I would agree with that. But on the other hand, it has the uniqueness that we are taking them and putting them into a community, in effect, and the extent that our judgment turns out to have been wrong about them, we're visiting them on at least different people than they would have been visited on before. There may be some special obligation there, I would think.

Mr. KNAPP. We are in agreement, in principle, with the concept you have outlined. I think things are going to have to be worked out in terms of funding and compensation levels and things like that. But in principle, we're in agreement.

Mr. SAWYER. We had some hearings in the last Congress, and witnesses have said the subsistance funds, or whatever they pay relocated witnesses for subsistance, are not subject to garnishment even for child support. They cited the IRS and some others. We had that checked into, and their only ruling was that these subsis-

tance payments were not subject to income tax, but not that they were not subject to child support and other things.

What is the position now?

Mr. SAFIR. That is correct. The IRS ruling ruled that the subsistance payment to witnesses was not income. We have not in the past specifically garnished witnesses' funds because we have not viewed it as income. Those are subsistance payments, paid for the witness and his family to be housed, to eat, for medical care, and this kind of thing, and did not look at it as wages or income that could be garnished. We have maintained that position.

However, where there are creditors, and where there is child support, in the case of child support, if a felony warrant is issued for nonpayment, we have returned witnesses to the courts to answer those warrants and we encourage a witness on the civil side to answer his obligations. We serve civil processes, and as I stated before, if the witness does not comply, in concert with the Department, if they agree, we can disclose his location.

Mr. SAWYER. On relocation, do you try to assist in getting the person a job or someway they can earn a living?

Mr. SAFIR. Yes. In fact, our policy is that we will not terminate a witness from subsistance funding until we get him a reasonable job offer or he refuses to work.

Mr. SAWYER. When you relocate, do you take into account the ethnic background or other background of the individual in the community you relocate him in? In other words, would you take someone of rather recent Greek heritage and put him in with a group of Serbians, for example, a community like part of Cleveland?

Mr. SAFIR. I would hope we would not. What we do, we do a preliminary interview of the witness before he comes into the program, and that is usually done a month or a number of weeks before actual entry. That preliminary interview, which is done by a witness security inspector, goes down all of his requirements, his ethnic background, his employment skills, his education, his probation or custody problems, his medical problems, and then we have a four-step review at our headquarters in which we determine the best relocation area for him.

Of course, the first thing we have to look at is danger areas. There have been some witnesses, unfortunately, in which the danger areas are so extensive that where we locate him is rather limited. But we do take that into consideration.

Mr. SAWYER. You take into consideration employment opportunities and that sort of thing, too, I assume.

Mr. SAFIR. Yes, we do.

Mr. SAWYER. Have you been pretty successful at getting them jobs?

Mr. SAFIR. I think a fair answer to that is it depends on the witness' attitude and his inclination. All we can do is provide a witness with the basics. This has to be a partnership. If he wants to work and become a productive member of society, we can and we will find him a job.

Mr. SAWYER. We ought to get you up in Michigan right now.

Assuming they are willing to work, you have been pretty much able to get them some kind of suitable employment.

Mr. SAFIR. We have. The word "suitable" is often a dispute between us and the witness, because many witnesses think they have better qualifications than we believe they do.

Mr. SAWYER. Do you help find them a house and a place to live and all that sort of thing?

Mr. SAFIR. We do find them rental property. We are prohibited under current regulations from buying or selling real property. But we do find them rental housing, yes.

Mr. SAWYER. Thank you.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. You indicate some 17 percent recidivism, but I think the next witness will testify on behalf of the General Accounting Office that they looked at approximately 800 witnesses—And even though your program is about 10 years old, these are relatively recent. These are 1979 and 1980 entrants into the program.

They obviously had limitations in getting information about these people, and I think one of the difficulties is the statistics here, how reliable and how complete and how much reporting is done. But they were to get information on about 378 witnesses and that 86, or 23 percent, had been arrested since their admission to the program for a number of types of crime—shoplifting to murder.

They have 165 witness charges—that is to say, on an average, these people were twice arrested of the 86—and that the number of charges was 213 with reference to 370 witnesses. That seems to be quite a bit higher than I think we were formerly led to believe. In other words, the incidence of crime by protected witnesses is a bit higher than I think we would have been led to believe formerly, and particularly since this GAO study is relatively recent.

So I am wondering what your comments are, whether we really don't have more of a problem than meets the eye here with reference to sort of recidivism and crimes committeed by protective witnesses.

Mr. SAFIR. I don't question the 23 percent figure found by GAO. Just prior to the hearing I was discussing that with them and they used somewhat of a different data base than we used. However, the fact is, 17 percent or 23 percent, that's too much.

However, on the other hand, if you take the same population of criminal felons—and most of our people, over 95 percent, are criminal felons—and you look at their recidivism rate, I think you would find the program appears to have some rehabilitative effect on witnesses. We are working through our psychological testing to reduce that recidivism rate, but the fact is that people coming into the witness program are not nice people, a majority of them anyhow. They are criminals with serious felony backgrounds. The fact is they will continue to commit crimes, and we will work to reduce that as best we can.

Mr. KASTENMEIER. Let me go back to square one with you. When you get a request from the U.S. attorney—as we have a fellow here who is going to be our witness; it is an organized crime case and we're going to have to offer him some sort of security. What options do you have, what is the range of options, other than giving him a new alias and placing him in some midwest town, let's say? Are your options, among other things, minimum security, a prison setting in the event that he, too, has committed crimes, or if he is

already in prison, some sort of segregated protection within a prison setting, deportion in some cases?

What range of options might you have with respect to an individual needing protection, depending on circumstances, other than relocation and alias?

Mr. SAFIR. Well, when we get a witness—and I think Mr. Knapp should answer part of this—the adjudication has already taken place. He is legally free on the street with whatever conditions of probation or parole comes with it, so our options are relatively limited. We can either relocate him and provide him with full services in a secure manner, as we do with most of our witnesses, or we can temporarily relocate him during the period of the trial and then return him back to the danger area if he is not going to be in danger or if the people are incarcerated.

Other than that, all the witnesses, when we get them, we have no legal option other than the degree of protection.

Mr. KASTENMEIER. In other words, I should be talking to whom, Mr. Knapp, the U.S. attorney or the Department of Justice. Who at the outset considers the range of options as to what to offer or what to do with this individual.

Mr. KNAPP. I think the U.S. attorney makes the initial recommendation, and obviously, if there is something short of the witness protection program which is adequate and he feels is adequate, he would probably utilize that procedure. Once it gets to the Office of Enforcement Operations, we do make a total assessment as to whether this is really necessary, as well as to the value of his testimony.

Obviously, if he's a prisoner witness, he would be put into a segregated facility. However, ultimately this person will be released on parole and at that time he probably would have to be given a new identity. So any serious case is ultimately going to end up with the U.S. Marshals Service.

Mr. KASTENMEIER. If the Congress or others are interested in, let's say, a tighter screening of those admitted to the program, particularly in terms of new identity and a new location, we should be mindful of what other options you have. If we put you in a position of saying "Gosh, we can't take a chance with this individual", then what other options do you have? You see, this is what I'm trying to explore with you because I think that is the other part of the question.

Mr. KNAPP. I don't know if it's a serious enough case there are any other long-range options. There are obviously some short-range options. He can be guarded, but that's very expensive. That option passes after a short period of time. If this is the type of case that is really serious and there's a danger to the witness, I can't really recognize any other viable alternative.

The witness on his own, in his particular circumstances, may just opt to go off some place on his own and not enter the program, and many have done that because they don't want to relocate to a certain area. But short of that, there really are no other options.

Mr. KASTENMEIER. Do you relocate these witnesses customarily in large cities such as New York, Los Angeles, or are those settings generally considered too dangerous for them?

Mr. SAFIR. It depends on the individual witness, Mr. Chairman. We relocate witnesses everywhere, large cities, small cities. It depends on the individual danger areas to that witness.

Mr. KASTENMEIER. Well, among other things, I would like to explore further with you what options you have other than new identity and relocation to handle this problem, because I think that is a question that we have to think through with you in a sense to understand your problem.

Mr. SAWYER. Would the chairman yield for a question or two?

Mr. KASTENMEIER. Yes.

Mr. SAWYER. What kind of false identity or new identity do you provide the person with?

Mr. SAFIR. We do not provide any false identity. All of the documents we provide are based on a legal name change. What we do provide is dependent on what the witness needs. But basically we provide a new drivers license, birth certificate, social security card, military records, those kinds of documents, and then any other ancilliary documents that might be individual to each case.

Mr. SAWYER. Do you get their name legally changed?

Mr. SAFIR. That's correct.

Mr. SAWYER. Do you suppress that or do something with that so that nobody can get access to that?

Mr. SAFIR. I would prefer not to discuss that in open session.

Mr. SAWYER. OK. I was just curious.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. FRANK. First, Mr. Chairman, I would ask unanimous consent that, under the rules, we grant permission for this hearing to be covered by cameras.

Mr. KASTENMEIER. Without objection.

Mr. FRANK. If I could just ask a couple of supplementary questions. The notification procedures to law enforcement—in the *Pruett* case we had problems there. What is the new procedure now? Are local law enforcement people told when someone moves into the area?

Mr. SAFIR. They are not.

Mr. FRANK. Do you have objections to telling them?

Mr. SAFIR. Yes, sir.

Mr. FRANK. Based on security?

Mr. SAFIR. Based on security. We do not even tell people in the U.S. Marshals Service who are not involved directly in the Witness Security Program where witnesses are relocated.

Mr. FRANK. What safeguards do we have, then, to guarantee any requests about the new identity about that individual by a law enforcement official? I assume we are agreed that any legitimate law enforcement request about that individual should give the past record; is that agreed?

Mr. SAFIR. We are.

Mr. FRANK. How do we handle that?

Mr. SAFIR. We have entered into an agreement with the Federal Bureau of Investigation for a procedure by which we have provided them with new and old names of all protected witnesses. They have developed a procedure within FBI headquarters where when an inquiry is made in either name it is immediately recognized as a protective witness.

Mr. FRANK. So any local law enforcement official today that inquires of the FBI about an individual will get information today. Is that operational?

Mr. SAFIR. That's correct.

Mr. FRANK. As of now, there will be no—obviously, there is always occasional human error—but the system is now so geared that any request by a law enforcement agency about one of these individuals—What about for job checks? I assume in that case it would not happen?

Mr. SAFIR. The job checks would go to the Bureau, and in each case, as in criminal cases, we would be notified.

Mr. FRANK. And if it was an inappropriate job, you would step in?

Mr. SAFIR. Yes, and we hopefully will have counseled the witness before that happened.

Mr. FRANK. Yeah, but if you didn't?

Mr. SAFIR. Yes, we would contact the witness.

Mr. FRANK. And suppose the witness says "I'm going to do it anyway"? Suppose the witness says, "I don't care about you; this bank guard job is a terrific one and I'm going to do it anway". What do you do then?

Mr. SAFIR. Well, if the witness happened to have been a bank robber, we would step in and make sure he did not obtain that job.

Mr. FRANK. You will prevent the witness from obtaining inappropriate employment.

Mr. SAFIR. Yes, we would.

Mr. FRANK. And any law enforcement official who asks now will get the information from the FBI?

Mr. SAFIR. Assuming it is a bona fide request.

Mr. FRANK. In other words, if they said "What ever happened to old Joe Barboza" to take a name at random, you wouldn't give it to them, but if they asked about John Smith, who happened to have been somebody else, that would come forth, in the course of their investigatory——

Mr. SAFIR. That is correct.

Mr. FRANK. One last question.

It was talked about how you satisfy people who have gotten judgments. What happens if I am about to bring suit against someone who decamps under this program? What's my recourse?

Mr. SAFIR. We will serve the process on the witness.

Mr. FRANK. Is it a defense against a default that I am off in the witness protection program?

Mr. SAFIR. No. We will serve the process and we will make the return in a secure manner.

Mr. FRANK. So even if I haven't gotten my case to court yet, I am protected. You're saying it ought to be by a referee of some kind?

Mr. KNAPP. The judgment, the enforcement of the judgment as a last resort should be by a referee or a master.

Mr. FRANK. But nothing would interfere with my right to proceed to judgment?

Mr. KNAPP. No.

Mr. FRANK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. To follow up, the Justice Department has implemented the mechanism to transfer a protected witness' rap

sheet to a requesting state or local law enforcement agency. One of the questions I have—and I guess perhaps the next witness can answer it—is the National Crime Data Bank, the NCIC, what happens is that if it is John Dillinger, his name will appear as John Dillinger, plus all the offenses which he may have been convicted of or charged with. But if you have this John Doe in Omaha, that won't appear, nor would there be any cross-reference to that in the NCIC; is that correct?

Mr. SAFIR. There would be a response, but there would not be an immediate cross-reference if they did it through inlets or through a computer, that's correct.

Mr. KASTENMEIER. When you say a response, what do you mean?

Mr. SAFIR. In other words, if a police officer in a local jurisdiction sat down at his teletype machine and teletyped the NCIC computer relative to a new name, he would not get a response of the original criminal record. However, when that happened, it would be flagged at FBI headquarters and we would be notified and then tell the FBI to respond.

Mr. FRANK. Just let me understand how that meshes with the answers to me. What you're saying is it wouldn't come out of the NCIC, but the fact of a request by a law enforcement official to the NCIC data bank would result in that law enforcement official being told by an FBI person that this individual that has a prior identity in every case?

Mr. SAFIR. Correct.

Mr. SAWYER. Would the chairman yield for a question?

Mr. KASTENMEIER. I yield to the gentleman from Michigan.

Mr. SAWYER. How long would it be before you get that kind of response back?

Mr. SAFIR. The agreement is no more than 72 hours.

Mr. SAWYER. What do you do about the case where a law enforcement officer stops somebody for a traffic violation on the road, and here he's a very dangerous guy and the officer phones in and they check NCIC, which they do; he doesn't get the word that he's dealing with a very dangerous guy in time to do him any good, does it?

Mr. SAFIR. That is correct. That is one of the security considerations, unfortunately, that we cannot let the thousands and thousands of people who have access to this equipment out in the field to have instant response time before we can make sure it is a legitimate inquiry.

Mr. SAWYER. I know very often that they will label somebody in NCIC as dangerous, too, I mean not only telling him there's a felony warrant out but that the man is dangerous. The officer handles it with the benefit of that advice before he goes back from his cruiser to the car that he has pulled over. He just kind of flies it blind now.

Mr. SAFIR. With felony warrants it's a different situation, Congressman, because when there is a felony warrant issued for a witness, we are notified of that and then his status changes. Outstanding felony warrants, the FBI would be notified and we would not have that same situation for a witness who was a fugitive.

Mr. FRANK. Seventy-two hours seems to be excessive. You know, maybe someone is being held and 72 hours might be longer than someone could be held. I can understand a 24 hour response time,

but 72 hours does seems to be longer than law enforcement officials ought to have to wait.

Mr. SAFIR. I think you're right, and I think 72 hours is in the agreement and is the outside limit. I think in practice it is considerably quicker.

Mr. FRANK. The agreement between whom and whom?

Mr. SAFIR. The Marshals Service and the FBI.

Mr. FRANK. You see, the trouble with that agreement is that neither party to the agreement is the one who is needing the information. I don't mean to impugn your bona fides, but my guess is if you ask the law enforcement officials or some representative group to negotiate that agreement with you, whether it was the International Association of Chiefs of Police or some other, they would think 72 hours is excessive and I would hope that you would cut that at least in half.

Mr. SAFIR. We do have a 24-hour duty officer who responds to those inquiries and responds as quickly as humanly possible.

Mr. DEWINE. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio.

Mr. DEWINE. Could you define what is a legitimate inquiry? What is your definition?

Mr. SAFIR. That is a legitimate investigation by a legitimate law enforcement organization, that we have no reason to believe is a fishing expedition to find out information not related to a legitimate inquiry.

Mr. DEWINE. OK. But let's take an example of someone who is stopped for a traffic violation. Is it my understanding that once they put that into a computer, of course, it does not come back anything, but that flags it and then that law enforcement agency is contacted within the 72 hours?

Mr. SAFIR. Not for a traffic violation.

Mr. DEWINE. Well, that's what I didn't understand. I thought that was your response.

Mr. SAFIR. Not for a traffic violation.

Mr. DEWINE. So for traffic, absolutely nothing?

Mr. SAFIR. That's correct.

Mr. DEWINE. The law enforcement agency will never know that.

Mr. SAFIR. That's true.

Mr. DEWINE. Let's take the misdemeanor.

Mr. SAFIR. Our current policy is we do not respond to misdemeanors.

Mr. DEWINE. So again it will come back nothing, even though a person does have a record. Your break-off point is with the felony, then?

Mr. SAFIR. That's correct. Although a majority of the misdemeanor and traffic inquiries would not go formally to NCIC.

Mr. DEWINE. Where does it go when a State trooper pulls someone over?

Mr. SAFIR. Usually to a State system.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. We thank you very much for your testimony this morning, Mr. Safir and Mr. Knapp. Let me just say in conclusion, you made some suggestions for legislative change, and in an instance I think you have actually given us language.

I would suggest that where you really do want changes legislatively, that you might prepare language in the other cases as well so that we can see precisely what is intended from your standpoint. In your case, Mr. Knapp, I think mostly you cited your three reservations or exceptions you had. If there are any other provisions which we have not included which would be useful or necessary in your view, you might also communicate those to the subcommittee.

Mr. KNAPP. Thank you very much. We would be glad to do so.

Mr. KASTENMEIER. Next the Chair would like to call our last witness, Mr. William Anderson, Director of the General Government Division of the General Accounting Office. Mr. Anderson has appeared before this committee on previous occasions, including his appearance last year in connection with the same subject.

The General Accounting Office has, as a result of congressional request, developed an expertise with respect to this program. Mr. Anderson is ably assisted in this effort by John Ols, Bill Staab, and Mark Ahrens.

On behalf of the subcommittee, it is a pleasure to welcome you. Your work in the area has certainly been of material assistance to us.

We received a copy of your written statement and, without objection, it will be made part of the record and you may proceed, Mr. Anderson, as you see fit.

TESTIMONY OF WILLIAM J. ANDERSON, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY JEFF JACOBSON, OFFICE OF GENERAL COUNSEL, AND WILLIAM STAAB, AUDIT MANAGER

Mr. ANDERSON. Thank you very much, Mr. Chairman. Good afternoon. I would like to start off by introducing the gentlemen at the table with me. To my right is Jeff Jacobson. Jeff is an attorney from our Office of General Counsel, detailed on a permanent basis to assist me and my division with our work in the law enforcement area. To my left is Bill Staab, whom you mentioned. He was the audit manager on the work we have been doing for you, looking at the U.S. Marshals Service.

With your permission, sir, I would like to have my full statement entered in the record. I have an abbreviated version I would like to go through and will keep it as short as possible.

Mr. KASTENMEIER. Without objection.

Mr. ANDERSON. The information we are presenting today is based in large part on our reviews over the last 2 years of the operations of the U.S. Marshals Service, which was performed, by the way, at the request of Senator Max Baucus. In addition, we have some ongoing work requested by this subcommittee, some questions you put to us, Mr. Chairman, after our testimony last September. In fact, we are going to be conveying some early results of that work to you today.

In March 1983, we issued a report to Senator Baucus which discussed deficiencies within the Witness Security Program. In that report we discuss certain deficiencies within the Witness Security Program that enabled relocated witnesses to avoid legal obligations to the detriment of various third parties, such as creditors. This

problem arose because the Justice Department would not disclose witness information to a third party to help the third party to discover either who and/or where to sue to seek the enforcement of a legal right such as a court judgment.

To its credit, Justice has taken several actions to mitigate these problems. However, our report recommended that additional administrative and legislative actions be taken to more adequately control the situation, and apparently Justice now will agree, as a minimum, to having legislation along these lines.

Let me talk a little bit about the ongoing work we are doing for you. You raised the subject of protected witnesses committing new crimes after entering the program, and requested that we examine that as well as several other issues.

First, with respect to the nature and extent of criminal activity by relocated witnesses, you did point out our results showing that about 23 percent of the witnesses have been arrested since their admission to the program, in contrast to the 17 percent that the Department showed. I think there is a very logical explanation for this difference. I think both figures are correct, and it is the way the samples were drawn that accounts for the differing results.

The Marshals Service and the Department of Justice's estimate was based on looking at a period of time, say, from March 1980 to December 1982. Although those are not the exact dates. Their study looked at the recidivism for all the witnesses in the program as of December 1982—in other words, this study would have included people that would have been in the program as little as a month, some that had been in 6 months, and some that had been in 2 years.

For purposes of our sample, we drew from a series of witnesses who had been in the program at least for 2 years. Therefore, there had been a greater and more uniform chance for them to become recidivists.

Our study wouldn't have included anybody who was only in the program for 1 month or 2 months or 6 months. Therefore, I would conclude that our 23 percent is probably a more accurate gauge of witness recidivism. We do have attached to our statement a breakout of the types of crimes that we are talking about.

I think that within that 23 percent, about 12 percent—46 out of 378—were involved in crimes that could have involved hurting somebody, so to speak. I will break away from even my shortened text and get into that. The crimes committed by these 46 witnesses included assault and battery, firearm-related, armed robbery, or robbery, murder and homicide, and disorderly conduct. All of these represent crimes that could have involved bodily harm in some fashion.

The final returns are not in. As you pointed out, Mr. Chairman, we have obtained files on 378 of the 800 witnesses that we are pursuing this on.

The figure that I cited applied to our findings with respect to the 378. When we get the rest of the data in, that number could go up or down. We will have to wait and see.

Another thing that you wanted us to do is try to find out the prosecutive results of cases involving protected witnesses' testimony. Was it all worth it, in effect? What happened on the cases where

we did use a protected witness? Generally we have found that witnesses have testified and prosecutions have been achieved in cases involving such groups as organized crime families, narcotics trafficking rings, and prison gangs. In other words, that, in fact, the type of cases, the type of criminals that we were trying to strike to when the act was established are those that we are currently getting to through the use of the Witness Security Program.

The attachment to our statement contains some statistics on the number of people who were convicted as a result of testimony by witnesses. For that part of our study we have currently tracked the results involving 144 witnesses. Those 144 witnesses provided testimony in cases that resulted in 577 convictions, about a 4-to-1 ratio. In other words, it appears that, from the early returns in our study, bringing one of these people into the program would result in four people being put behind bars for some period of time.

The attachment to our testimony contains statistics on how long these people are incarcerated. There are quite a large number that are incarcerated for a significant period of time, or at least receive sentences of 2 to 4 years.

Mr. KASTENMEIER. You mentioned a class called prison gangs. Presumably these are people already in prison. This, presumably, would involve moving one or more prisoners or inmates to different status within an institution or to another institution.

But this seems unlike the typical relocation, new identity problem that would involve the Marshals Service. How are prison gangs involved with the Marshals Service as opposed to the Prison Bureau?

Mr. ANDERSON. In other words, the scenario that I would envision is that we have a prison—let's take one of these prison gangs that operates inside and outside of jail, or a person in prison associated with some type of organized crime outside of the prison.

A crime is committed within the prison involving one of those people. For example, the crime that Defendant Pruitt—we have heard that name on many an occasion—he provided testimony against a person who killed somebody else in a prison.

Now, at that point in time, he was induced to provide testimony against the person that he witnessed killing the other prisoner, and in return for providing that testimony which, in fact, endangered his life considerably as a fink, he was entered into the Witness Security Program.

Well, as long as he must remain incarcerated they would provide the witness security—perhaps in another more secure prison. Conceivably even a new identity in another prison. Other witnesses this morning made the point very well. I mean, you don't get out of jail and you don't get out of any legal charges that are otherwise pending against you as a result of entering this program.

Mr. STAAB. The Department would probably provide you a different identity in another prison if you were a fairly well-known prisoner. More than likely, however, I think what they would do is just transfer the individual to another prison if they felt that was a secure alternative. If not, at that point they would just change the name on the records so that you were known under a different name in the alternative prison you were moved to. The prison gangs that we classified here was an attempt to show the various

types of organized criminal activity prosecuted with the use of this program.

Mr. KASTENMEIER. Is this Federal Bureau of Prisons only or the State?

Mr. STAAB. This could also be State prisons, I believe.

Mr. ANDERSON. I would like to comment generally on H.R. 3086 and say that overall we support the bill. We believe it addresses many of the concerns that have been raised by us and others regarding the Witness Security Program.

We believe that several sections need some clarification or at least some reconsideration. Let me go over these, if I may. In some places what I am going to say is going to conflict a little bit with what you heard earlier, but we will deal with that as those occasions arise.

First, providing information on witnesses to law enforcement agencies. One section of the bill provides that the Attorney General will disclose witness-related information to law enforcement officials when requested. Another section of the bill, however, establishes criminal sanctions against any person who disseminates without the Attorney General's consent such information.

We believe a potential exists where State or local law enforcement officials will be provided witness-related information for investigative purposes but would not be able to use it without the Attorney General's consent. A wording change eliminating the restriction for law enforcement purposes is all that is needed to alleviate any potential problems. That is no big deal, but it is some place where the legislation could be refined.

We believe that the principle of providing law enforcement officials with witness-related information is a sound one. Here is where I am going to be telling you some things that are going to conflict with what we said earlier. I will tell you why I think they conflict, but I am not sure.

We believe that the present structure of one source of this information, the National Crime Information Center, creates the possibility of State and local officials not receiving accurate information on the criminal records of protected witnesses. As recently as 2 months ago, my auditors spoke to people at the Federal Bureau of Investigation and were led to believe that the criminal histories of witnesses in the NCIC were not cross-indexed to the true identities of witnesses in the program. I cannot explain that, sir. That is what we were told. You heard contrary testimony today that would indicate that, in fact, such linkages can be made. If so, it is news to us. It would solve one of the problems that we discussed in our statement here.

What we are aware is that if you go for a fingerprint check, yes, indeed, the procedure that we just heard about is in place; that, in fact, it would surface and there would be a contact, depending on the nature of the crime. There would be feedback to the requesting law enforcement authority. We are not aware that such a program existed with respect to NCIC. I don't know what more to say on that subject.

Mr. SAWYER. Mr. Chairman, may I just ask a question?

Mr. KASTENMEIER. Yes.

Mr. SAWYER. I don't understand. At least the last information I knew, they can't get into the file with just a fingerprint. They have got to have the name of somebody and then confirm with the fingerprint that it is the same person.

So if they haven't got the right name, what good is a fingerprint going to do?

Mr. STAAB. The Bureau, as I understand it, can get into a person's criminal record, obtain their criminal record through a fingerprint search—it is a lot more difficult that way because of all the classifications and the reading of the prints. They can facilitate thin research it if they have a name associated, with the print.

Mr. SAWYER. It used to be substantially impossible. Maybe they have improved in the last 5 or 6 years, but they weren't able—it would just be pure luck if they did it before.

Some of the people working those fingerprint files are so familiar with them that they will even see things they think they recognize in a fingerprint like you or I might see in a picture and can luck out putting their finger on one.

But, normally, a fingerprint does you no good unless you have already got a suspect. Then you can find out if the suspect is the right person.

Mr. ANDERSON. Right now the way the program is operating, sir, it is operating along the lines that a query will come with a set of fingerprints and the new identity. In fact, the FBI is able with that information——

Mr. SAWYER. Then they take the new identity and go in; is that right?

Mr. ANDERSON. Yes, sir.

Mr. SAWYER. Then they cross-reference the old identity.

Mr. ANDERSON. That is correct. I am sorry I didn't make it clear. That is flagged within the system, yes.

In any event, I can't resolve that for you, sir. I will certainly be glad to followup on that and provide for the record that I raised this subject and that we went back to the FBI and we will confirm or deny what we were told originally on that subject.

Mr. SAWYER. Just another question, if I may, Mr. Chairman.

Why won't they do it with just a name, if they will do it with the name and the fingerprints? I don't understand that.

Mr. ANDERSON. I think that they are concerned about the access to NCIC. Right now there is an experiment, the Interstate Identification Index, which even expands access to information in NCIC.

I think there may be some concern there about the ability of somebody to even know that the flag was raised.

Mr. STAAB. The real problem lies in the quick response time of the NCIC system. It is an online computer system. You have got thousands of terminals located throughout the United States and in North America, Canada, Puerto Rico, and the like where individuals could literally just sit down and start typing in names, looking for a response that could ultimately link somebody to, hey, Joe Jones is really Joe Barboza. That is their concern because it is instantaneous and there is no control over it. You type something in, the computer will respond as programmed.

Their concern lies is the quick response time. When you go through a name and fingerprint search, it takes time. The Bureau

gets it. It takes them a number of days. I think the average time it takes is 10 days for them to process and respond to a fingerprint request. Once they make the match through the flagging system and determine that a particular print really belongs to a relocated witness, they then stop routine processing, call the Marshals Service and advise them of the situation and circumstances that led to the match, and then the dissemination is made at that point. So you are dealing in terms of days, as opposed to seconds in response time.

Mr. SAWYER. I am still getting confused on this. Let's say that Joe Barboza—since you used the name—is now Joe Smith, and they know he has relocated, let's say, in Grand Rapids, Michigan.

Now the Grand Rapids Police Department, the detective bureau there, checks on a Joe Smith. If he doesn't send the fingerprints, he doesn't get anything? If not, why can't they do it just with the Joe Smith and cross-reference over?

Mr. ANDERSON. Your point is very well taken, sir. It makes no sense not to do it. We were told they didn't do it. When we go back, we will also raise the question, well, why don't you do it because it would seem that the flagging that was described would be that easy, that the main thing is offline the requesting agent would get a declination, no, no such record.

However, at least at the receiving end, people at NCIC would know that there had been a query on a name that represented the new identity of a witness. They are not doing it. I don't see why they are not doing it.

Mr. SAWYER. That is what puzzles me. I don't see where the fingerprints add anything to it, you know, other than making certain, but certainly it would be clear if they knew the guy was located in Grand Rapids, and the Grand Rapids police, so they know, you know, it is a legitimate source.

Mr. ANDERSON. Your point is well taken, sir, and we will follow up on that with them. The assessment of the risk to a community resulting from witnesses' relocation, another section of the bill would require the Attorney General to make a written assessment of the possible risk of danger to people and property in the community where a witness is to be relocated. It also requires the Attorney General to certify that the need for a witness' testimony outweighs the risk of danger, if any, to the public. One thing to keep in mind is that right now there is an organization called the Office of Enforcement Operations that should be doing this.

In other words, we are assigning this responsibility to the Attorney General, but there is already a focal point in the Department of Justice where the Marshals Service's views on this witness and his or her probable behavior in the program, the views of the U.S. attorney on how vital this testimony is, the views of the investigating agency on how vital this information is, and the views of the cognizant organization in the criminal division. All these people provide inputs to the Office of Enforcement Operations which is supposed to balance it all and arrive at some kind of a balanced decision. In fact, a person you might want to get up here is the person who runs the Office of Enforcement Operations because that is really where these decisions are being made, and these tradeoffs are being made.

In any event, this section of the bill would require the Attorney General to make difficult assessments about the future actions of witnesses and the prosecutive outcomes of cases. It is unclear as to the specific basis on which the Attorney General is to make his assessment. For example, is the risk of danger provision intended to cover only criminal actions or also civil matters? Further, within these broad categories, what types of violations constitute a danger to people and property in the community? Because of the difficulty in making such assessments, the subcommittee may wish to provide the Attorney General with more specific guidance in this area.

The last section of my summary was going to deal with civil proceedings. I think that we have heard an awful lot about that already. I think that we see a need for a legislative remedy as the bill proposes. We heard an alternative legislative remedy from the Department today, but we haven't had a chance to think about it. On the surface, it seemed to make some sense. So on that note, sir, I think perhaps, sir, our time would be best taken if we stopped and tried to answer any questions you may have on the basis of the work we have done over the last couple of years at the Marshals Service.

[The statement of Mr. Anderson follows:]

STATEMENT OF WILLIAM J. ANDERSON, DIRECTOR, GENERAL GOVERNMENT DIVISION ON H.R. 3086

Mr. Chairman and members of the subcommittee, we appreciate the opportunity to testify before you today on our past and present work relating to the activities of the U.S. Marshals Service, and on H.R. 3086. This bill would amend existing laws governing the protection of Government witnesses, the performance of U.S. marshal duties, and the fees that can be charged by marshals for serving process and rendering other services in connection with litigation in Federal courts.

We recently completed several reviews of the operations of the U.S. Marshals Service and U.S. marshals which resulted in three reports to Senator Max Baucus who requested the studies.[1] The most recent report concerned the Witness Security Program. At your request, Mr. Chairman, we are currently examining criminal activity by protected witnesses and the types and outcomes of cases prosecuted with their assistance. Our testimony today will focus on aspects of the bill concerning the Witness Security Program. Overall, we support the bill. We do believe, however, that several sections need clarification or expansion.

RECENT GAO REPORT ON THE WITNESS SECURITY PROGRAM

Our most recent report directly relates to a significant portion of this bill. We reported that protected witnesses are able to avoid legal obligations to the detriment of various third parties because the Justice Department would not disclose information on a witness' new identity or location to resolve a civil dispute. This practice shielded witnesses from civil obligations whenever they refused to comply with court orders because third parties could not identify either who and/or where to sue to seek the enforcement of their legal rights. This resulted in:

Non-relocated parents, who were either separated or divorced, having difficulty exercising their legally established parental rights with respect to their relocated minor children.

Creditors being hindered in their efforts to recover debts owed to them by witnesses.

To its credit, the Justice Department has taken several actions which we believe will mitigate these types of problems in the future. Specifically, it has (1) taken a more aggressive stance in verifying child custody orders before relocations take

[1] These reports are "U.S. Marshals' Dilemma: Serving Two Branches of Government" (GGD-82-3, April 19, 1982); "U.S. Marshals Can Serve Civil Process and Transport Prisoners More Efficiently" (GGD-82-8, April 22, 1982); and "Changes Needed In Witness Security Program" (GAO/GGD-83-25, March 17, 1983).

place, (2) offered to facilitate neutral site visitations for non-relocated parents and their children, and (3) issued an internal memorandum to help facilitate the collection of unpaid debts by witnesses.

Contrary to our report, the Justice Department believes these administrative initiatives are adequate to address this problem and that legislation is unnecessary. However, being administrative in nature, these initiatives are always subject to change. Moreover, in situations when the third party believes the disclosure of a witness' identity is crucial to his/her enforcement of a judgment, the Department makes the final decision. We believe that overall public interests would be better served if existing law was amended to provide the Attorney General with guidance concerning his role in resolving third party problems and the circumstances under which disclosure will occur. We also believe that such legislation should provide third party judgment holders with the opportunity for judicial review of the facts on which the Department based its nondisclosure decision. As such, we are pleased that this bill proposes legislation to establish such a judicial review process. We will comment more on this portion of the bill later.

GAO'S ON-GOING EFFORT TO EVALUATE THE WITNESS SECURITY PROGRAM

During hearings before this subcommittee last September, the subject of protected witnesses committing new crimes after entering the program was discussed at length. As a result of those hearings, Mr. Chairman, you requested that we initiate a study to determine the nature and extent of criminal activity by protected witnesses. At that time you also requested that we look at several other related issues including selection procedures for admitting witnesses to the program and the effect of supervision by probation officers on the criminal activity of witnesses. Recently, we began to receive information from the Justice Department necessary to examine these matters. I will briefly discuss the status of our work which is about one-third complete.

Criminal activity by protected witnesses:

Regarding criminal activity by protected witnesses, the Marshals Service, with cooperation from the FBI, is in the process of providing us with criminal history information (rap sheets) for the approximately 800 witnesses who entered the program during fiscal years 1979 and 1980. To date we have received information for 378 (or 48 percent) of the 800 witnesses.

Of the 378 witnesses for whom we have information, 86 (or 23 percent) have been arrested [2] since their admission to the program. This percentage is probably somewhat understated because the calculation included some witnesses who have been incarcerated either all or most of the time they were in the program.

The 86 witnesses who were arrested were charged with a variety of crimes, ranging from shoplifting to murder. A summary of the crimes for which the sample witnesses have been arrested is detailed in appendix I to this statement.

Prosecutive results of cases involving protected witnesses' testimony:

The Office of Enforcement Operations, the component of Justice's Criminal Division responsible for admitting persons to the program, is in the process of providing us with information on the results of prosecutions involving 308 protected witnesses' testimony. It was agreed that the Office of Enforcement Operations would provide us with summaries of all cases involving witnesses admitted to the program between June 1, 1979, and May 31, 1980. This time period was chosen for two reasons. First, it provides a sufficient amount of time for the completion of almost all cases in which these witnesses testified. Second, it provides a view of the program which is reflective of current conditions in that major changes in admission practices took place in February 1979.

To date we have received prosecutive results information for 144 (or 47 percent) of the 308 witnesses who entered the program during this time period. For each case, we received a summary of the nature of the case, a list of all defendants and their roles in the case, charges, the witnesses' relation to the case, a description of the threat to the witness, a statement regarding what forum (grand jury and/or trial) the witness testified in, and the outcome of the case with regard to each defendant (including the sentence imposed).

Generally, we found that witnesses have testified, and prosecutions have been achieved in cases involving such groups as organized crime families, narcotics traf-

[2] We realize that a conviction might be a more appropriate definition of recidivism, however, the ultimate disposition reporting on the rap sheets was such (under 50 percent) that we believe arrest is the best available indicator. The use of arrest also coincides with an April 1982 Marshals Service study.

ficking rings, and prison gangs. In appendix II we have compiled a matrix which indicates the types of cases for which the Department has admitted witnesses to the program. The common thread or reason for admittance running through the vast majority of the cases we analyzed was the threat of reprisal or potential harm to the witness.

Overall, information that we have received to date shows that for cases prosecuted with the testimony of protected witnesses, the conviction rate for defendants was about 78 percent, and the median prison sentence imposed was in the 4 to 6 year range.

A detailed listing of this information is contained in appendixes III and IV.

COMMENTS ON H.R. 3086

At this time, we would like to offer comments on H.R. 3086. Overall, we support the bill. We believe it addresses many of the concerns that have been raised by us and others regarding the Witness Security Program. However, we believe that several sections need clarification or expansion.

Providing information on protected witnesses to law enforcement agencies:

We believe that a potential difficulty exists in fulfilling the joint purposes of sections 3521(b)(1)(F) and 3521(b)(3). Section 3521(b)(1)(F) provides that, upon request, the Attorney General must provide relevant information to State and local law enforcement officials on protected witnesses. However, section 3521(b)(3) provides that a recipient cannot further disclose this information without authorization of the Attorney General. Without the authorization, the potential exists for such information to have limited value to State and local law enforcement officials if the prohibition against further disclosure applies to using this information for law enforcement purposes directed against the witness, such as in a judicial or grand jury proceeding. This matter could be addressed by revising section 3521(b)(3) to provide that the sanctions in that subsection do not apply to disclosure by a State or local law enforcement official in a judicial or grand jury proceeding directly related to the protected person.

There is one other matter related to section 3521(b)(1)(F) that we would like to advise the subcommittee about at this time. It involves the sharing of protected witness information through on-line computer systems. It is a matter that we are considering as a part of our review for this subcommittee and one about which we have not yet reached a conclusion.

We agree with the principle underlying section 3521(b)(1)(F) that requires the Department to share available information about protected witnesses with State and local law enforcement officials who request it. However, we believe the present structure of one source of this information creates the possibility of State and local officials not receiving accurate information on the criminal records of protected witnesses.

The type of information State and local law enforcement agencies would initially seek from the Justice Department is whether a suspect has a criminal record. This can generally be obtained from Justice in two days. One way is by requesting a subject's rap sheet through a fingerprint search and the second way is through an inquiry of the National Crime Information Center (NCIC). NCIC is a centralized computer center connected by a telecommunications network to terminals located in Federal, State and local criminal justice agencies throughout the United States, Canada and Puerto Rico. One component of NCIC is an on-line criminal history file.

The Justice Department has implemented a mechanism to transfer a protected witness' rap sheet to the requesting State or local law enforcement agency in a secure manner. However, because of security concerns, the Department has not cross-indexed a witness' arrest record from his/her old identity to the new identity within NCIC's on-line criminal history system. As a result, a check of the criminal history file of NCIC under a witness' new identity would produce a "no record" response even if the witness had an arrest history under an old identity. Such "no record" responses are likely to be inaccurate because an estimated 95 percent of witnesses have criminal backgrounds. We are considering a solution to this difficult problem as part of our on-going work for the subcommittee.

Assessment of the risk to a community resulting from a witness' relocation:

Section 3521(c) would require the Attorney General to make a written assessment of the possible risk of danger to persons and property in the community where a witness is to be relocated. It would also require the Attorney General to certify that the need for the witness' testimony outweighs the risk of danger to the public. The proposed legislation would prohibit the Attorney General from protecting witnesses if the risk of danger to the public outweighs the need for the person's testimony.

We support the concept of considering the risk to the public in the program's decisionmaking process. In this regard, we note that the bill also authorizes Federal probation officers to supervise State probationers and parolees admitted to the program. This addresses longstanding concerns over the lack of supervision of these individuals. Further, as you are aware, the Marshals Service has begun giving witnesses psychological tests which can help identify potential problems with witnesses. We believe both of these efforts can reduce the risks to the public.

However, it should be recognized that this section requires the Attorney General to make difficult assessments about the future actions of witnesses. It is unclear as to the specific basis on which the Attorney General is to make his assessment. For example, does the risk of danger intend to cover only criminal actions by protected witnesses, or also civil matters? Further, within the broad categories of criminal and civil matters, what types of violations constitute a danger to people and property in the community? Are financial and familial considerations to be evaluated? Because of the difficulty in making such assessments, the Congress may want to provide the Attorney General additional guidance in this area.

A question also arises concerning the purpose of requiring that the Attorney General's risk assessment be in writing and be certified. Since the section does not provide for the written assessments or certifications to be submitted to and reviewed by the Congress, it is unclear whether they are for the purpose of congressional oversight. Further, it is not clear whether the written assessment and certification would be available to a plaintiff in litigation who alleges that the Department improperly admitted a person to the Witness Security Program. To alleviate any potential controversy, it would be useful if the purpose and proposed use of the Attorney General's written assessment and certification were clarified.

Responsibilities of protected persons under agreement:

Section 3521(e) states, in part, that the Attorney General may terminate the protection provided by the program to any person who substantially breaches the agreement established between that person and the Attorney General pursuant to section 3521(d)(1). Section 3521(d)(1) lists four responsibilities of the protected person which will be set forth in the agreement. Two of these deal with matters related to the person's testimony or security. A third provides that the person not commit a crime punishable by a prison term, and a fourth is a general provision requiring the person to cooperate with reasonable requests of Government employees providing protection. We have two comments to offer in relation to these responsibilities.

First, it is not clear whether the third responsibility would include an offense punishable, for example, by 90 days in a county jail as opposed to a prison. Second, it is not clear if, or under what circumstances, failure by the person to abide by civil penalties or remedies could be encompassed either by the fourth responsibility, or by section 3521(f)(1) which authorizes the Attorney General to order the person to comply with court ordered judgments. In any event, we believe that subsection (d)(1) should clearly include as part of the agreement, the responsibility of the person not to commit any criminal offense and to comply with court orders in any civil dispute. In this way, protected persons clearly would be on notice of the types of behavior on which their continued protection is conditioned.

Civil proceedings:

Sections 3521(f)(1) and (2) are designed to address a problem that various third parties—such as creditors—have experienced after persons have been relocated by the Government. The problem is the inability to enforce a judgment against a person when his/her new identity and location are unknown.

These sections contain most of the elements we recommended in our recent report to deal with these circumstances. Overall, we believe that the bill as drafted indicates a strong desire to improve the opportunity for third parties to obtain satisfaction of court ordered judgments. However, we would like to suggest some revisions for the subcommittee's consideration.

Corrective action by the Attorney General:

Section 3521(f)(1) provides that if the Attorney General determines that the protected person has not made reasonable efforts to comply with the judgment, he may either disclose the person's identity and location to the plaintiff, or enter an order requiring the person to comply with the judgment. A protected person's failure to comply with the Attorney General's order would constitute a substantial breach which may lead to termination of his/her protection. This raises a question concerning what relief would actually accrue to a third party judgment holder.

First, we note that termination under subsection (e) is not mandatory even for a substantial breach. Further, because termination of protection is not defined and may be viewed as an alternative to disclosure, it is unclear whether termination

will result in a third party receiving the information needed to seek enforcement of the court judgment against a protected person.

For these reasons, we believe that regardless of whether the Attorney General is authorized and decides to terminate protection, the legislation should clearly provide that disclosure will occur in instances when a witness is terminated under subsection (f)(1).

Could a hearing be obtained?

Subsection (f)(2)(A) provides that third parties shall be entitled to a judicial hearing if the Attorney General unreasonably fails to disclose information. This suggests that some evaluation by the court of the Attorney General's decision must be made before the hearing could be obtained. We believe this poses a difficult procedural hurdle for the third party.

In the proposed legislation contained in our recent report, a third party would be entitled to a hearing simply if the requested information was not provided. The reasonableness of the Attorney General's decision was to be considered by the district court in deciding whether to affirm the Attorney General's nondisclosure decision or to issue an order requiring him to disclose the requested information. Subsection (f)(2)(B) of this bill similarly addresses this matter. We continue to believe that the opportunity for a third party to merely obtain a hearing should not be conditioned on his/her ability to satisfy some burden of proof. Accordingly, we recommend striking the word "unreasonably" from subsection (f)(2)(A).

Responsibility of the Attorney General:

In our recently issued report, we suggested legislation that would require the Attorney General to disclose the new identity and location of a witness to third parties with judgments unless it can be established that the disclosure could likely result in harm to the witness or the witness does not have the ability to comply with the judgment. With this type of duty clearly defined, a court can more clearly assess whether the Attorney General has met his responsibilities under the law when disputes over disclosure arise.

Section 3521(f)(1), however, provides that the Attorney General may disclose after considering the danger to the protected person. We believe that the responsibility of the Attorney General and the basis for a court to review the implementation of that duty would be clearer if the legislation provided that the Attorney General shall disclose witness-related information to a third party unless the disclosure could likely result in physical harm to the witness. Otherwise, the Attorney General would have discretion not to disclose even though his consideration of the danger to the witness indicates there is little chance of harm. Also, the subcommittee may wish to adopt the provision in our proposed legislation which authorizes the Attorney General to consider the person's ability to comply with the judgment since neither party would benefit from a disclosure under this circumstance.

Victim compensation program:

Section 3522 establishes a separate fund to compensate victims of crimes committed by protected witnesses. It authorizes a maximum of $2,000,000 to be appropriated in each of fiscal years 1985 and 1986 from fines collected under section 1963 of Title 18, United States Code (Racketerring Influenced Corrupt Organization—RICO). Our review of statistics collected by the Administrative Office of the U.S. Courts for statistical years 1979, 1980, and 1981 showed that the average amount of fines imposed per year under the RICO statute was $1.2 million.

We realize the bill's $2 million figure represents a ceiling. However, the Administrative Office's average figure of $1.2 million is for fines imposed, not for fines collected. The amount collected, in all likelihood, would be considerably lower. Therefore, the subcommittee might want to consider alternative sources of revenue for this compensation fund.

Supervision of State probationers and parolees:

The bill contains an amendment to section 3655 of Title 18, United States Code, which would authorize Federal probation officers to supervise protected individuals who enter the program while on State probation or parole. In the past, even Federal probationers and parolees who entered the program were not supervised because of the potential security implications related to transferring their records from the danger area to the relocation area. Recently, a mechanism was implemented for Federal probationers and parolees which satisfies the Marshals Service's security concerns. We believe this same mechanism can be used for supervising witnesses on State probation or parole who enter the program. However, there is a matter we want to call to the subcommittee's attention.

Under both probation or parole, a person must comply with certain specified conditions. Sanctions can be imposed against those persons who fail to follow those specified conditions. It is not clear under this bill what will occur if a protected wit-

ness on parole or probation for conviction of a State crime violates a condition of parole or probation while under the supervision of a Federal probation officer. It is questionable whether the officer would have the legal means to enforce parole or probation conditions established by a State court or other State authority. We recommend that the subcommittee consider further amending section 3655 to also provide that if the person violates the condition of probation or parole, (1) the probation officer report such violation to the responsible State authority and (2) return the person to the custody of the State, upon request.

This concludes our prepared statement. We hope this information will be helpful to the subcommittee in its efforts to evaluate the Witness Security Program and during its deliberation on this legislation. We would be pleased to respond to any questions at this time.

APPENDIX I.—ARREST CHARGES AGAINST PROTECTED WITNESSES

Charge	Number of witnesses[1]	Number of charges[1]
Burglary/larceny/theft	26	36
Narcotic-related	17	25
Fraud/forgery	16	24
Assault/battery	15	19
Firearm-related	12	15
Armed robbery/robbery	11	12
Parole/probation/bond default	10	12
Stolen property crimes	7	9
Driving-related	5	9
Vehicle-related	6	7
Shoplifting	5	7
Impersonating/obstructing police officer	5	6
Murder/homicide	4	4
Disorderly conduct	4	4
Miscellaneous	22	24
Total	165	213

[1] The number of witnesses arrested and number of charges are greater than 86 because many witnesses were arrested more than once and/or were charged with different types of crimes at the same arrest.

APPENDIX II.—MATRIX OF PROGRAM USE BY CRIMES AND CRIMINALS[1]

	One crime by persons or groups	Motor-cycle gang	Prison gang	Major orga-nized crime group	Public official	Union official	White collar profes-sion	Other orga-nized crime groups	Total
Weapons/explosives	1	1	–	1	–	1	–	1	5
Arson	3	–	–	5	–	–	–	1	9
Murder/conspiracy to murder	9	1	5	4	–	–	–	1	20
Corruption	1	–	–	1	6	2	1	–	11
Rape	1	2	–	–	–	–	–	–	3
Extortion/loansharking	–	1	–	10	–	–	–	–	11
Burglary	–	–	–	1	–	–	–	1	2
Prostitution	–	–	–	–	–	–	–	2	2
Counterfeiting	1	–	–	–	–	–	–	4	5
Robbery	5	1	–	1	–	–	–	6	13
Pornography	–	–	–	1	–	–	–	–	1
Drug related	1	4	–	7	1	–	2	24	39
Tax evasion	–	–	–	3	–	–	–	2	5
Interstate transportation of stolen goods	1	–	–	6	–	–	–	7	14
Fraud/swindles	2	–	–	3	–	–	–	–	5
Kidnapping	–	–	–	–	–	–	–	2	2
Other	1	–	1	2	2	–	–	4	10
Total	26	10	6	45	9	3	3	55	—

[1] This matrix represents information received from the Office of Enforcement Operations for 144 witness admitted to the program between June 1, 1979, and May 31, 1980. These witnesses testified in 125 cases. Additional information is to be received on the other 164 witnesses admitted to the program during this same period.

APPENDIX III.—RANGES OF SENTENCES IMPOSED IN CASES INVOLVING PROTECTED WITNESS[1]

Range of sentence	Times imposed	Percent
Life	13	2.6
Greater than 20 yr	27	5.4
16 to 20 yr	13	2.6
10 to 15 yr	81	16.2
8 to less than 10 yr	28	5.6
6 to less than 8 yr	26	5.2
4 to less than 6	89	17.8
2 to less than 4	95	19.0
1 to less than 2 yr	34	6.8
Less than 1 yr	29	5.8
Probation only	65	13.0
Total	500	100.0

[1] The sentences of 57 of the total of 557 convicted defendants are presently unknown.

APPENDIX IV.—OUTCOMES TO DEFENDANTS

Category	Number	Percent
Convicted	557	77.6
Acquitted	[1] 66	9.2
Dismissed	46	6.4
Pending	25	3.5
Fugitive	5	.7
Murdered	4	.6
Not indicated	3	.4
Severed/no retrial	3	.4
Pretrial diversion	3	.4
No case brought	2	.3
No verdict/no retrial	1	.1
Immunity granted	1	.1
Declined prosecution/mental incompetency	1	.1
Civil case/no prosecution	1	.1
Total	718	[2] 99.9

[1] 2 cases accounted for 26, or 39 percent, of the acquittal total. It should be noted, however, that the Justice Department plans to retry 17 of these defendants.
[2] Percentage does not equal 100 due to rounding.

Mr. KASTENMEIER. Thank you for your testimony. I have a number of questions.

I would like to first yield, however, to my colleague, the gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. Is it a fair summary of your testimony that overall the program has been a stunning success as far as the ratio of the convictions?

Mr. ANDERSON. Overall, sir, on the basis of an awful lot of information that my auditors have obtained and secondary literature, I came away persuaded that we are getting to a number of criminals and a number of conspiracies that we would be unable to successfully attack absent this program and the participation of insiders.

Mr. DEWINE. The ratio you cite is quite phenomenal, it seems to me.

Mr. ANDERSON. Yes, sir. I really didn't know what that number would look like, but since we are talking about organized crime cases, there will often be a large number of defendants that are on trial in these types of cases.

Mr. DEWINE. Of course, you, I assume, have to rely—there is no way you gauge the validity of it—but you have to rely upon information that comes out of the Justice Department as far as—I guess my question, how do you attribute a conviction to a particular testimony?

I mean, if you have 50 witnesses testifying in court, and the Justice Department may say, well, yes, we couldn't have gotten a conviction without that person. I don't doubt that they are correct, but I guess it is sort of a caveat.

Mr. ANDERSON. That is absolutely correct, sir, yes. I can even point out that I had the staff check and tell me what the conviction rate is in cases using protected witnesses. We are getting 78 percent on these. That is about what we are getting across the board. But I really can't speak with true authority what differences the witnesses made.

Mr. DEWINE. A general call which the individual prosecutor has got to make.

Mr. ANDERSON. That is correct, sir.

Mr. DEWINE. Probably no one knows for sure if the case could have been won or not, but I am sure in some cases they couldn't even prosecute person without——

Mr. ANDERSON. I am sorry. That is where the testimony this morning brought out the fact that the number of cases has been dropping significantly over the years as Justice says it has been exercising more selectivity in deciding which cases really require the use of a witness. So you heard that the number of witnesses from 450 annually down to something under 300 now, reflecting this selectivity.

Mr. DEWINE. You may have covered this in your testimony. I apoligize I missed it. But what is the cost per person in the program?

Mr. ANDERSON. Well, the total program cost is right around $28 million annually right now. At any one point in time there is about—well, current figures, about 425 witnesses currently getting money, getting subsistense and, you know, really being a part of the program out of the, say, 4,000 that have been admitted since the programs inception.

The witnesses themselves, the number that was thrown out, is the correct number. Since 1970, about 4,000 people have passed through the program. Another 9,000 or so, dependents, were relocated, provided with these new identities and that sort of thing.

The current operating costs are now about $28 million a year. What we have—and what I haven't come to grips intellectually with is they will say that there are 425 of the 4,000 are active participants in the program. The average participant receives subsidence for 18 months. That 425 just happens to be about 18 months worth of witnesses at the rate of the last couple of years, so maybe it is people who are getting money out of the program. Then you have the different relationships that exist with the other 3,600.

People in the program, have assumed the new identities, they really have no connection at all with the Marshals Service today. I feel confident the Marshals Services doesn't know what is going on with those people.

So per capita cost, while the $28 million also covers the cost of the Marshals Service, about 270 staff years, they say, of their force are associated with administering and running this program. I could figure it would and get back to you, sir, but $28 million takes care of about 425.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. Thank you, Mr. Chairman.

Do you provide the person their academic credentials, or do they provide them with academic credentials under their new name?

Mr. ANDERSON. Yes, sir, but no more than they actually have earned and legitimately have. They won't give a person a college degree if they never obtained a college degree.

Mr. SAWYER. Suppose they did, how do they clear it with the college? Is there a way of doing that?

Mr. ANDERSON. That is probably what they would tell you——

Mr. SAWYER. I don't need to know the nuts and bolts. I am just curious, can they do it?

Mr. ANDERSON. They probably would want to talk about that under executive session, but they are doing it in some fashion. In some fashion, these people can get the essential credentials that they earned in their true identity.

Mr. SAWYER. Suppose, though, that you practiced law or medicine, let's say, maybe even applies to being a CPA, I assume. Probably does. You would have lost your license for having done all the bad things you have done. Could you then go in the relocated State and get relicensed by the examining board there?

Mr. ANDERSON. Let me defer here. I can't imagine you could.

Mr. STAAB. I don't know what they would do specifically. They are very quiet as to how they go about doing it. My guess is their policy would be that if a doctor lost his license to practice that they would not go about getting him another license to practice and a new identity in another State. On the other hand, if he wasn't in a position where he lost his license to practice, they would attempt to get him recertified to operate and practice in the State he has been relocated to.

Mr. ANDERSON. Let me give you some statistics, by the way. Give you a sense of where these people are coming from educationally.

Less than 1 percent would have an advanced professional degree of some kind. I mean, a master's, maybe an MBA, maybe even a CPA the actual number is about seven-tenths of 1 percent. About 5 percent would have a college degree; 4.8 percent would have graduated from college. About 16 percent had some college, but not a degree; 43 percent would have only completed high school. 34 percent did not complete high school. Overall, 66 percent completed at least high school while 34 percent did not. Of the 66 percent that completed high school, only 5 percent had completed college or better. That is the type of person that we are talking about. So it is kind of a mixed bag. Generally, people—getting back to the line of

questioning on finding them a job—60 percent of the skills witnesses claimed to possess were of an unskilled nature.

Mr. SAWYER. I can understand pretty easily how they could with State or Federal authorities, things like birth certificates or that kind of thing. But when you start dealing with high schools and academia all over, I am really curious how they pull it off.

Mr. ANDERSON. I am sure what we know we couldn't talk about that here either. So I won't ask Mr. Staab to speak to that.

Mr. SAWYER. I yield back, Mr. Chairman.

Mr. KASTENMEIER. Following up on that, there is a statistic that the average family of four during a period of protection costs $94,000, or something like that, that the Department of Justice contributes.

What would they spend the money for? Do they also supplement the income or other support services directly of these protected witnesses?

Mr. ANDERSON. My understanding was that they gave them a monthly subsistance allowance which was to cover the cost of living, rental of the facilities that they had acquired for them, relocation expenses, and that sort of thing.

Bill, was there anything——

Mr. STAAB. They cover—the relocation expense is usually fairly expensive. Subsistance, when you figure it runs 18 months on the average—and I think some of the payments are running around $1,500 to $1,600 a month per witness and his family group—it can get quite expensive. Taken over 18 months, that gets you up in the $20,000 range very quickly. They will pay medical payments. They will transport them back to the danger area for testimony. That all goes into a separate account. They keep track of how much money they spend in that fashion, as well. There are seven or eight different categories that they expend money on.

Mr. ANDERSON. One of the things to keep in mind is that in the past I think the program has been charged with being, perhaps, a little too close with the money in terms of providing amenities that witnesses deserve. We didn't come away with the impression that they are being too generous or too liberal for the moneys that are applied to the program.

Mr. SAWYER. Of course, apparently, it is tax free, though, which makes a little improvement.

Mr. ANDERSON. That is true.

Mr. SAWYER. Some of it is tax free under State income tax laws, too.

Mr. KASTENMEIER. You noted in your prepared testimony that at least one person was placed in the program in a civil case. Could you explain how this type of case could relate to the statutory criteria of organized crime activity?

Mr. ANDERSON. Yes, sir. I have that noted. Go ahead and give it, Bill.

Mr. STAAB. I don't know how this case particularly relates to the specific authorization of the program. I can tell you what the case was about. Apparently it was a conspiracy by 39 inmates who claimed that they were beaten upon arrival at a Federal penitentiary. They were getting together and civilally suing the Govern-

ment, the warden of the prison and a number of the guards, claiming $6 million worth of damage.

The Government had a witness, who was another inmate, come forth and, I guess, disclose his knowledge of the conspiracy. The Government ultimately prevailed and won the civil suit. That was the logic behind it. It was very obvious that the inmate was going to be in danger for his testimony in this, so they put him in the program. What they probably did was move him to another prison.

Mr. KASTENMEIER. Did you or anybody on your staff look at alternatives to relocation and new identity as a device?

Mr. ANDERSON. No, sir. We are just aware of the history of the program that originally provided witnesses a safe-house type of arrangement, and that this mechanism got awful expensive awful fast, and it provided a terrible environment for the witnesses and it was written off. I am not aware of any analysis that has been done by anybody of what the alternatives are to the current way of doing business.

Mr. STAAB. There is no other analysis I am aware of considering other alternatives. In talking with various types of law enforcement agents who have used the program, a number have expressed to us they think just mere relocation without the redocumentation would be a viable option. for some witnesses. It is not as secure a method, though. If you make a mistake, it is a very costly one, unfortunately.

Mr. KASTENMEIER. I think the statistics were that there were about 300 a year currently being placed. Is it your impression that the program has sort of leveled off in terms of overall new entrants to the program?

Mr. ANDERSON. It certainly seems to have over the last 3 years, at least. That 300 seems to be the number. Yes.

Mr. KASTENMEIER. Would it be your impression that the program could be widened beyond organized crime activity to possibly include other?

Mr. ANDERSON. Well, it is a fact, sir, that when you look over the last several years, the program was expanded beyond organized crime almost from inception. In our earlier report, I think we cited some of the types of cases that were involved in the witness protection program—murder, theft, public corruption, alien smuggling, arson, white-collar crime, conspiracy to commit murder, and prostitution. Then there were also major organized crime groups and other organized crime groups, but I gather that since the inception of the program there was a liberal interpretation of qualifying cases in order to let people crack the tough ones, and a witness was used if the crime seemed egregious enough or otherwise warranted.

Mr. JACOBSON. Mr. Chairman, the language offered in the legislation which authorized the Witness Security Program containing the words "organized crime" is not that dissimilar from the language contained in other provisions of that 1970 legislation also using the words "organized crime." From the very inception, the courts interpreted the phrase "organized crime" to reflect the type of criminal activity as opposed to the targets of the criminal activity. For example, arson, loansharking, drug smuggling, and that type of activity. It looks like the Witness Security Program has

been implemented in the same way as, for example, the RICO statute has been used in prosecuting.

Mr. KASTENMEIER. Would you have a recommendation with respect to whether or not on your own observations we ought to revise the statutory criteria, either broaden it or recommend that there may be some cases which don't fit technically within the criteria? We ought to go one way or the other, or from your own observation, Mr. Anderson, that just the liberal, judicial interpretation of the term is enough to cover the broad range of cases that they currently consider eligible for the program?

Mr. ANDERSON. I don't feel that the analysis that would be needed to make that type of recommendation has been made yet, sir. We certainly haven't made it. One of the attachments to our testimony, you know, is the matrix that we developed that shows the various type of crimes that witnesses were involved in helping build the Government's case. Some of them get further and further astray from organized crime by definition. But I would hate to say without perhaps tasking people from Justice to come forward with whether they think they feel a need for an extension of the authority. I would say that the cases that we have encountered we thought in just about every case was a legitimate application of this type of authority. Would that be a true statement?

Mr. STAAB. Yes. Other than the civil case that you mentioned which seems to be a little bit out of character with the authorization of the program, nothing strikes me—and I have read all 144 of these cases—as being questionable in terms of the types of cases they admitted.

Mr. SAWYER. Would the chairman yield?

Mr. KASTENMEIER. Yes, I yield.

Mr. SAWYER. I have gotten into this difficulty that I ran into when I first became a prosecutor. Organized crime and prosecutorial circles and court circles does not mean the Mafioso or La Costa Nostra.

It means any kind of crime where more than one person is participating in whatever it is. Up till then, when you mention organized crime, I thought a Mafia family type thing, but the term itself as used by prosecutorial, and the courts have blessed it, as to anything where more than one person is involved in it.

So I would think probably they would probably pretty well stay within the legal definition.

Mr. KASTENMEIER. Actually, the bill introduced is broader than organized crime, concerning an offense involving a crime of violence directed to the witness, et cetera, et cetera. Whether that is necessary or not.

Mr. ANDERSON. We certainly saw no problem with language like that, sir. It would just be an explicit statement with the broadness intended.

Mr. KASTENMEIER. We could go on indefinitely, but I trust you will be available for followup questions and possibly even interviews concerning this as this matter moves along, and I want to compliment you, Mr. Anderson, and your staff, others who worked with you, in terms of the good work you have done.

It has been obviously very helpful to Congress. Possibly good solution of these matters.

Mr. ANDERSON. Thank you very much, Mr. Chairman. We appreciate that.

Mr. KASTENMEIER. Accordingly, that concludes the testimony for today. The committee stands adjourned.

[Whereupon, at 12:25 p.m., the subcommittee adjourned subject to the call of the Chair.]

APPENDIXES

APPENDIX 1

Additional Material

Congress of the United States,
House of Representatives,
Washington, DC, June 22, 1983.

Hon. Robert W. Kastenmeier,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, DC.

Dear Mr. Chairman: As you may recall, I appeared before your Subcommittee last September to express my desire to see reforms made in the Federal Witness Security Program. I am still very interested in this issue and support the reforms proposed in your bill, H.R. 3086. I would like to request that my enclosed statement be included as part of the official record of the hearings your Subcommittee held on this legislation on June 22 and 23.

Thank you so much for your attention to this request.

With best wishes, I am

Sincerely,

Virginia Smith,
Member of Congress.

Statement of Congresswoman Virginia Smith

Mr. Chairman and Members of the Subcommittee, I commend you for pressing on with the efforts initiated by this Subcommittee late last Congress to review the Federal Witness Security Program and to consider legislation addressing the problems of this program—problems that have put violent, habitual criminals back on the street, endangering and costing innocent lives.

I want to voice my support for the reforms outlined for the Witness Security Program in the legislation under your consideration, H.R. 3086, the U.S. Marshals Service and the Witness Security Reform Act of 1983. I urge you to move this legislation before the full Committee and onto the House floor as soon as possible. The longer we delay in legislatively mandating the needed changes in the protected witness program, the greater the risk of further tragedy and needless death.

As you will recall, I appeared before this Subcommittee during the hearings held in September 1982. Appearing with me were my constituents, Mr. and Mrs. Frank Balderson of Alliance, Nebraska. Their son was one of the victims of Marion Albert Pruett's robbery and killing spree in 1981. I know the Subcommittee is fully aware of the Pruett case.

In my testimony last September, I pointed out my concerns about the inadequacies in the authorization for the protected witness program: (1) There are no established, consistent criteria in the law for selection and admission to the program; including no required psychological evaluation and required exclusion of individuals with extremely violent criminal histories. (2) There is no provision in the law requiring consideration of the threat a protected witness poses to the public in the relocation community; and there is no requirement that local law enforcement officials be informed that a potentially dangerous criminal has been placed in their area. (3) The U.S. Marshals Service neither assumes, provides, nor arranges any supervision or rehabilitation services to help ensure the protected witness does not return to crime. (4) Under current law, the program has allowed protected witnesses to be put above the law when the FBI and Marshals Service failed to properly and

expeditiously respond to local law enforcement officials, or the protected witness is able to hide behind a new identity that has for most purposes been wiped clean of any criminal record.

I believe H.R. 3086 addresses these concerns, and it goes further to establish a Victims Compensation Fund and to ensure protected witnesses can be held responsible for their civil obligations. It is a good piece of legislation that could only be made better, in my view, by expanding provisions to further define and restrict the program. I firmly believe that had the reforms in H.R. 3086 been in place in 1981, Marion Albert Pruett would not have been released following his wife's murder in New Mexico to rob and kill five more times. In fact, had the Justice Department been required, as proposed in the bill, to assess the potential risk of danger, Pruett would never have been released from prison and relocated. His criminal record leaves no doubt that he was a threat to society and should have never have been turned loose on the unsuspecting public.

Since its inception in 1970, the Witness Security Program has demonstrated that it is an important and essential component in the Federal Government's fight against organized crime. And granted, the Justice Department has taken action in response to criticism of the program and implemented new procedures. But as is pointed out in the GAO report on the Witness Security Program (March 17, 1983), these are administrative reforms that can easily be changed or abandoned. I think we in Congress must assume the responsibility to guarantee reforms are made and every possible safeguard put in place in the program for the public's protection.

Again, I want to commend you for your work on this issue. I am hopeful and optimistic that with your leadership we will see this legislation enacted in the near future, perhaps by the end of this session. This will surely be one of the more significant and important accomplishments of this Congress.

Statement of Senator Sam Nunn

Mr. Chairman, I appreciate the invitation to participate in these hearings and to offer my thoughts on the Federal Witness Security Program (WITSEC) as well as H.R. 7039 which provides, in part, for reform of that program. This Committee is to be commended for its efforts to promptly and responsibly examine a program which has generated so much concern and discussion within the criminal law enforcement community.

In my work as former Chairman and currently Ranking Minority Member of the Senate Permanent Subcommittee on Investigations, I have had the opportunity to closely examine a number of issues of critical importance to American law enforcement, including the Witness Security Program. During the last few years, our Subcommittee has explored the problems of organized and violent crime and the adequacy of law enforcement efforts against that crime. We have held numerous public hearings on those issues, including those covering illicit narcotics profits, mob violence, labor racketeering, and waterfront corruption.

As part of this effort in December, 1980, our Subcommittee examined in detail the operation of the Witness Security Program, with an eye to strengthening and improving that program. In doing so, we underscored the fact that an effective Witness Security Program can and should be one of the most critical and essential tools available to law enforcement in its fight against organized crime. This type of program provides law enforcement agents and prosecutors with the ability to offer government witnesses some protection against the violent retaliation which they would otherwise face should they choose to testify against organized crime. If we are to continue to secure this kind of critical testimony against the violent criminal underworld, we must do our utmost to maintain a strong, effective and credible Witness Security Program.

The program, as we know it today, was created by the Organized Crime Control Act of 1970. It is administered by the United States Marshals Service with the assistance of the Bureau of Prisons. At the time of our December 1980 hearings, about 3,500 witnesses and about 8,000 of their dependents were participating in the Witness Security Program. Most of the witnesses requiring protection were involved in cases dealing with the activities of organized crime.

In three days of hearings, our Subcommittee heard testimony from numerous protected witnesses, members of their families, prosecutors, investigators, as well as representatives of the Social Security Administration, the Bureau of Prisons, and the U. S. Marshals Service. From that testimony, it quickly became obvious that the program, as it has come to operate, is strongly in need of improvement in a number of critical areas.

Our hearings showed that when the program was first given to the Marshals Service some ten years earlier, the Marshals had, unsurprisingly, little or no preparation and training for the kind of skills which the task of protecting and relocating endangered witnesses would require. Their experience had been in vastly different areas: Federal court security, service of subpoenas, and matters relating to the judicial system itself. They were hardly prepared to embark on the task of protecting and relocating witnesses, finding them homes, new documentation, and jobs, as well as assisting them in coping with the stress of building and accepting totally new identities and new lives. Moreover, the Marshals' Service suffered from understaffing by as much as 40%. As a result, those operating the new program were slow to anticipate the many problems which it would inevitably generate.

By contrast, federal prosecutors were quick to make use of this new-found opportunity to insure the testimony of critical witnesses via the guarantee of protection and a new identity.

With that background, problems inevitably resulted. We heard testimony again and again about problems and delays in witnesses receiving adequate documentation to support their new identity. The hearings showed that oftentimes poor coordination and low priorities by the agencies responsible for new documentation resulted in substantial and unreasonable delays in securing the documents. We heard time and time again of the failure of the program to provide adequate assistance to relocated witnesses in securing employment. We were told of numerous instances where in fact the safety of the witness was jeopardized by casual or offhand remarks by inadequately trained program employees. We heard that incarcerated witnesses were sometimes placed unprotected in general population areas of prisons where the threat of violent retaliation was perhaps the greatest. Moreover, witnesses frustrated by problems and delays in the program had no central avenue by which to channel their complaints to those responsible in the program.

Based on our hearing testimony, the Subcommittee, in its report dated December 14, 1981, made twenty-five specific recommendations concerning operation of the program. I am submitting to the Committee along with my testimony a copy of that report and recommendations.

I am pleased to see that some of the provisions of H.R. 7039, the bill before the Committee this morning, are directly in keeping with our Subcommittee's findings and recommendations. I would like to comment briefly on some of those provisions which I think find particularly strong support in the record of our December 1980 hearings.

One of the principal recommendations which our Subcommittee made as a result of the hearings was that the supervision and control of the Witness Security Program be reorganized and centralized. Hearing testimony underscored the need for a clear line of authority, responsibility, and accountability. We specifically recommended that that chain of command run directly from the office of the Attorney General to the Witness Security Program itself. Only with such centralization of authority will the program receive the necessary priority, control, and coordination within the Department of Justice.

H.R. 7039 builds on that recommendation by providing for centralized authority for the program, with a direct line of responsibility to the office of the Attorney General. Moreover, it clarifies the scope of the program itself, providing full flexibility for furnishing documents, housing, transportation, living expenses, employment, and other incidentals essential to relocation.

The bill also specifically provides that, in each case, the Attorney General shall enter into an agreement with the witness, setting forth specifically the obligations of each party. Those provisions are fully in keeping with the evidence produced at our hearings. As opposed to a specific binding agreement, we were told that a witness could depend only on a "memorandum of understanding", a copy of which was routinely not provided the witness and which was not considered binding by the Marshals Service. There is a need for a clear understanding, by both the government and the witness, of their responsibilities under the program. The provisions of H.R. 7039, requiring a specific agreement on those obligations, are a clear step in that direction.

Another Subcommittee recommendation was that an adequate and formal complaint procedure be established to enable witnesses with legitimate complaints to obtain an objective and fairminded hearing. Our evidence had shown that, due to both a lack of centralized authority as well as an absence of a formal complaint procedure, witnesses had little or no effective avenue by which to vent legitimate complaints. H.R. 7039 speaks directly to that testimony and to our Subcommittee recommendation by providing for judicial review and hearing of any alleged breach of the agreement, whether the breach is alleged by the government or by the witness.

Review of such disputes by a detached judicial officer, guided by the specified written agreement of the parties themselves as to their mutual obligations, will serve to insure fair treatment for both the government and the protected witness should a dispute arise.

In two separate Subcommittee recommendations, we urged the Justice Department to seek the cooperation and assistance of other Federal agencies in adequately carrying out the objectives of the program. Particularly in the area of documentation, it is obvious that increased coordination with the appropriate agencies will improve the ability of the Marshals Service to quickly and accurately provide the needed papers to relocated witnesses. I am pleased to note that H.R. 7039 specifically directs that all Federal agencies shall cooperate fully with the Attorney General in the operation of the program. Only through such coordination and cooperation can we fully marshal available Federal resources to insure an effective Witness Security Program.

I note that there are additional provisions of the bill which are also aimed at strengthening and improving current operation of the program as well as the U.S. Marshals Service itself, although they do not speak directly to points specifically covered in our Subcommittee hearings. As I fully support any reforms which would improve the effectiveness of the Witness Security Program, I encourage this Committee to fully study those provisions in light of all the testimony produced in our Subcommittee hearings as well as before this Committee yesterday and today. Again, I commend the Committee's fine work in considering this legislation and in thoroughly preparing for these hearings.

In closing, I want to again emphasize the critical importance of the Witness Security Program to our ability to maintain a strong and effective law enforcement community. It is, without doubt, one of the most vital tools available to prosecutors in their battle against organized and violent crime. We must do everything in our power to insure that that tool is kept oiled and running by guaranteeing the strength and credibility of the program itself. In our continuing fight against crime, we simply cannot afford to do anything less.

Thank you.

Witness Security Program and Merit Selection of U.S. Marshals

The Speaker pro tempore. Under a previous order of the House, the gentleman from Wisconsin (Mr. Kastenmeier) is recognized for 5 minutes.

Mr. Kastenmeier. Mr. Speaker, today I am introducing a bill to restructure the U.S. Marshals Service and to reform the operation of the witness security program. This bill represents a continuation of the bipartisan work done in this area by myself, and Senators Nunn, Baucus, and Cochran.

The U.S. Marshals Service is among the oldest and proudest Federal law enforcement agencies. In the past decade, the Marshals Service has been assigned two important law enforcement responsibilities. First, operation of the witness security program; and second, apprehension of fugitives. Each of these duties involves sensitive law enforcement operations and requires modern management structure and accountability. Thus, a singularly important change made by my bill with respect to the Marshals Service is to provide for the merit selection of marshals by the Attorney General.

The second major feature of this bill is to revamp the way in which the witness security program is run. In 1970 the Congress authorized the Justice Department to hide and give new identities to persons who are witnesses in organized crime cases. In the intervening years this program has become an important tool in organized crime prosecutions in the view of many law enforcement personnel. Unfortunately, Congress, the General Accounting Office and victims of the program. These critics point to: First, the excessive number of participants, second, poor admission screening, third, frequent complaints about noncompliance with agreements between the Government and protected witnesses; fourth, inability of persons with legal claims to find a secure judgments against protected witnesses; and fifth, tragic incidents of protected witnesses committing crimes of violence against innocent persons.

In the bill I am offering today I have attempted to balance the needs of the law enforcement community with the valid concerns of the program's critics. Thus, the bill creates a new authorization for the program, but does so with some new constraints. Specific changes made by the bill include:

First, more restrictive selection criteria, and a requirement that persons placed in the program be approved by top officials in the Department of Justice;

Second, creation of a crime victims compensation fund for victims of crimes committed by protected witnesses;

Third, procedures to make it easier for judgment creditors to seek relief;

Fourth, provision for Federal probation officers to supervise all protected witnesses on probation or parole (regardless of whether the person is serving a State or Federal sentence);

Fifth, creation of an independent hearing mechanism for the adjudication of disputes between protected witnesses and the Marshals Service;

Sixth, a firm requirement that the Federal Government disclose to the State and local law enforcement officials the identity and previous criminal history of protected witnesses.

In closing, I must express my appreciation for the work done on this subject in the other body. I have especially benefited from the substantive legislative suggestions of Senators Nunn, Baucus, and Cochran. I hope to work with them and my House colleagues to enact this measure into law.

APPENDIX 2

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, January 5, 1983.

Hon. RUDOLPH W. GIULIANI,
Associate Attorney General,
Department of Justice, Washington, DC.

DEAR MR. ASSOCIATE ATTORNEY GENERAL: In order to further the oversight activities of the Subcommittee on Courts, Civil Liberties and the Administration of Justice with respect to the operations of the United States Marshals Service it would be most helpful to obtain some additional information. Therefore, I request that you make available to appropriate members of the Subcommittee staff the following information:

(1) Relevant information concerning the participation of Brian Starry, Douglas Schlachter, Alexander Raffio, Mr. Holden (No. 2225), and Rod (referred to in the enclosed newspaper clipping) in the Witness Protection Program.

(2) Information with respect to the termination of Robert P. LaRoche as the United States Marshal for the Eastern District of California and subsequently his termination from employment.

(3) Information concerning the indictment and subsequent replacement of the United States Marshal for the Southern District of Florida.

In response to previous inquiries my staff has worked out an arrangement with respect to reviewing the files of so-called protected witnesses. A similar arrangement will hopefully be available in this case.

Thank you in advance for your cooperation in this matter.

Sincerely,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration of Justice.

Enclosure.

February 1, 1983.

Hon. RUDOLPH W. GIULIANI,
Associate Attorney General,
Department of Justice, Washington, DC.

DEAR MR. ASSOCIATE ATTORNEY GENERAL: In the course of the Subcommittee's ongoing oversight of the activities of the United States Marshals Service and the Department of Justice Witness Security Program I am hereby submitting a request for additional information. Therefore, we would appreciate receiving a copy of the following documents:

(1) An investigative report prepared for the Deputy Attorney General concerning the placement of Mr. Zambito in the Atlanta Penitentiary. It seems apparent from a review of the file in the Pruett case that Mr. Zambito should not have been placed in a prison which held persons so hostile to Zambito.

(2) A copy of the current agreement between the United States Marshals Service and the FBI with respect to the sharing of criminal history information and the use of the NCIC;

(3) The written criteria to be applied by the Department in determining whether to disclose the identity of a witness when an innocent third party has an outstanding judgement against a protected witness;

(4) Copies of the annual and monthly statistical reports of the Marshals Service for the last two years;

(5) A copy of the current memo of understanding;

(6) An indication of the status of the implementation of the April 1981 recommendation of the Department of Justice Evaluation Division with respect to a management information system for the U.S. Marshals Service.

Thank you in advance for your assistance in this matter.
Sincerely,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 7, 1983.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is with further reference to your letter of January 5, 1983, regarding the Witness Security Program.

With respect to your first question, information regarding witnesses identified in the newspaper article as Brian Starry, Mr. Holden and Rod will be made available to Subcommittee staff on a confidential basis at any mutually convenient time. Your staff may contact Cary Copeland (633-4117) of this Office to arrange for review of these three files. As for the other two witnesses, we have no record of any Alexander Raffio ever having participated in the Witness Security Program and thus have no information regarding him. The witness identified as Douglas Schlacter has not yet completed his testimony for the Government and thus our file regarding him is not available for review at this time.

With respect to the second question regarding former U.S. Marshal Robert P. LaRoche, Mr. LaRoche was appointed U.S. Marshal for the Eastern District of California by President Carter. He was replaced when the new U.S. Marshal appointed by President Reagan took office on September 30, 1982. Of course, U.S. Marshals serve at the pleasure of the President and are aware upon being appointed that they have no entitlement to federal employment when they are replaced.

Your third question related to the U.S. Marshal for the Southern District of Florida. On December 16, 1982, U.S. Marshal Carlos C. Cruz was indicted by a Federal Grand Jury on charges of conspiracy, bribery, and other offenses. A copy of the indictment is being sent to me and will be forwarded to you when received so that you will have complete details regarding the offenses charged. As a result of Mr. Cruz' indictment, his appointment as U.S. Marshal was terminated by the President. Pursuant to law, the Chief Judge for the Southern District of Florida filled the vacancy with a court-appointed Marshal pending appointment and confirmation of a successor.

Of course, I hope the information set out above together with the indictment to be sent and the files available for inspection will be responsive to your inquiry and that you will let me know if you require further information or if I can be of assistance in any other way.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 28, 1983.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: With further reference to your letter of February 1, 1983, requesting documents related to the Witness Security Program, I am enclosing the report of the Board of Inquiry concerning the murder of William Rhett Zambito.

I will be in touch with you further in the near future regarding the other items you requested. In the meantime, I hope the enclosed report will be helpful with respect to the Zambito case.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

Enclosure.

Board of Inquiry Report

Examination of Facts Antecedent to the Murder of Inmate William Rhett Zambito at the United States Penitentiary, Atlanta, Georgia, on March 23, 1978

On March 27, 1978, Norman A. Carlson, Director of the Federal Bureau of Prisons, appointed a Board of Inquiry to examine all the facts leading up to the murder of William Rhett Zambito at the United States Penitentiary, Atlanta, Georgia, on March 23, 1978, and to report its findings to him (see attachment #1). J. Michael Quinlan, Executive Assistant to the Director of the Federal Bureau of Prisons, was appointed Chairman of the Board of Inquiry. Other members were Judith Bartnoff, Special Assistant to the Acting Deputy Attorney General, Department of Justice; J. Jerome Bullock, United States Marshal, Washington, D.C.; and James A. Meko, Correctional Programs Specialist, Central Office, Federal Bureau of Prisons.

During the course of the investigation conducted by the Board of Inquiry, the members conducted some 60 interviews (list of interviews—attachment #2) of law enforcement personnel and reviewed relevant records in Atlanta, Georgia, Miami, Florida, and Washington, D.C. Interviews were conducted with personnel in the Federal Bureau of Prisons at the U.S. Penitentiary, Atlanta, Georgia, and the Federal Correctional Institution, Miami, Florida, as well as with personnel in the Central Office of that agency in Washington, D.C. In addition, interviews were conducted with personnel from the Miami and Atlanta offices of the Organized Crime and Racketeering Section, Criminal Division, the U.S. Marshals Service in the Northern District of Georgia (Atlanta) and the Southern District of Florida (Miami), the U.S. Probation Office in Atlanta, Drug Enforcement Administration Miami Regional Office, the Bureau of Alcohol, Tobacco and Firearms Atlanta Office, and Dade County, Florida law enforcement agents and Florida states' attorneys.

The Board received excellent cooperation from every person and agency contacted during this inquiry. This cooperation allowed us to obtain a great deal of information about the Zambito case in a short period of time.

CHRONOLOGY OF EVENTS

The deceased prisoner, William Rhett Zambito was a thirty year old married white male resident of Miami, Florida whose criminal record dated to his thirteenth year and included one prior commitment and convictions for Breaking and Entering, Auto Theft, Burglary and Receiving Stolen Goods. At the time of his death, first degree murder charges were pending in state court in Miami, Florida. He was serving a seven year federal term, imposed in the U.S. District Court, Northern District of Georgia (Atlanta), on August 19, 1977, for a Narcotics Violation. He was known to Dade County and federal authorities for criminal activities and had from time to time since 1972 provided information concerning his and others' criminal activities to state and federal law enforcement agencies.

During 1976, Dade County, Florida, and federal drug agents were investigating a drug operation in the Southeast United States operated by John Charles Piazza, III. On January 16, 1977, Zambito, a suspect in the drug investigation, was arrested by Florida Highway Patrolmen in Stuart, Florida, for a speeding violation. A search of his vehicle revealed approximately two and a half pounds of cocaine, 110 pounds of marijuana, and approximately 1200 valium tablets. In addition, the officers found a sawed-off shotgun and approximately two quarts of dried human blood in Zambito's trunk. At the time of the arrest Zambito advised Martin County, Florida, Sheriff's Deputies that the cocaine and marijuana came from John Charles Piazza.

Upon investigation it was learned that commencing in November, 1974, Zambito was involved in a large scale organized criminal conspiracy to possess and distribute large quantities of narcotics in the Southeastern United States. Together with co-defendants Charles Keck and Allan Benton, he travelled, on numerous occasions, from Miami, Florida, to Atlanta, Georgia, to deliver quantities of cocaine and marijuana for John Charles Piazza, III, to certain other cooperating individuals.

On January 21, 1977, Zambito was released on $5,000 bond, allegedly provided by co-defendant Piazza. While out on bond, Zambito cooperated with Dade County, Florida, authorities in their investigation of certain homicides connected to the Piazza drug conspiracy. Zambito confessed to one of the murders and implicated Allan Benton, a co-conspirator in the drug case, in two homicides. Zambito was indicted on one of the murders in Dade County.

Apparently in an effort to be spared from the death penalty for his involvement in these deaths, Zambito agreed to cooperate with federal authorities investigating the Piazza drug case. In mid-March, 1977, Zambito travelled to Atlanta to meet, in the office of Organized Crime Strike Force Attorney William McCulley, with Mr.

McCulley and agents of ATF, DEA, and Dade County and discussed possible cooperation on the federal charges. Mr. McCulley and others who attended do not remember discussing in any detail the Justice Department Witness Protection Program with Mr. Zambito; however, they do recall that Zambito was emphatically against receiving any special protection. The Strike Force group were aware at this time of Zambito's involvement in several homicides and thus believed Zambito was a person to be feared by any co-defendants.

On March 28, 1977, the Martin County $5,000 bond was revoked after John Piazza allegedly learned of Zambito's cooperation and withdrew the money for the bond.

On April 7, 1977, Zambito and ten co-defendants were indicted in the federal district court in Atlanta in connection with the Piazza drug conspiracy. Zambito remained in state custody in Florida until May 26, 1977, when he was taken by U.S. Marshals from the Northern District of Georgia on a writ of habeas corpus ad prosequendum issued by the federal authorities in Atlanta in connection with the drug case. While in the Atlanta area, Zambito was housed in the Cobb County Jail under an assumed name in order to be separated from co-defendants Piazza, Benton, and Keck (who were initially held at the Fulton County Jail in Atlanta) and to keep his location unknown to Cobb County detectives who were investigating certain aspects of a related drug case. The placement of Cobb County was arranged through oral discussions between agents for the Strike Force, including a Dade County detective, and the U.S. Marshals Office in Atlanta. While the Cobb County facility, Zambito continued to cooperate with federal authorities.

Prior to his conviction and seven year federal sentence, the government, through Organized Crime Strike Force Attorney McCulley in Atlanta, entered into a plea agreement (attachment #3) with Zambito in which the government agreed to advise any court or law enforcement agency which Zambito desired of the extent of his cooperation and to recommend that the sentence imposed run concurrently with any other sentence to which Zambito was subject at the time of sentence. For his part, Zambito agreed to plead guilty to one count of the drug conspiracy, continue to cooperate with the government in the investigation of other illicit activities and to testify for the government in the Piazza narcotics conspiracy case. In fact, Zambito testified for the government against a co-conspirator in the federal court in Atlanta, but the defendant was acquitted, perhaps in part because Zambito was not a particularly good witness.

Based on the plea agreement, Strike Force Attorney McCulley wrote a letter documenting Zambito's cooperation with law enforcement authorities to U.S. District Judge Freeman, who was to sentence Zambito on the drug charge (attachment #4). In addition, the DEA and Dade County Narcotic Agents prepared material and spoke to the assigned U.S. Probation Officer, calling to his attention the cooperation of Zambito and the threats that has been made against his life. The Probation Officer placed the information regarding cooperation in a confidential attachment to the pre-sentence investigation.

After sentencing on August 19, 1977, and satisfaction of the writ of habeas corpus, Zambito was placed in holdover status at the United States Penitentiary, Atlanta, Georgia, on August 26, 1977, pending his removal by U.S. Marshals to Dade County, Florida. He was held in Atlanta until August 31, 1977, and then taken to Dade County by U.S. Marshals. After sentencing, neither the Strike Force members nor the Marshal in Atlanta took any steps to inform the transporting U.S. Marshall or Dade County authorities of Zambito's cooperation in the drug case. Upon return to Florida, Zambito refused to cooperate further with local authorities concerning the two ongoing murder investigations. He fired his public defender, hired a private attorney, and began to challenge the murder indictment.

On December 22, 1977, Zambito received a five year term "concurrent to the seven year federal sentence" for possession of a sawed-off shotgun in Martin County, Florida.

After the conviction he was returned to Dade County in connection with the murder indictment. Apparently in order to relieve overcrowding in the Dade County Jail, correctional authorities attempted to place Zambito in the Florida Penitentiary at Raiford to serve the five year term. However, officials at the Lake Butler Reception Center refused to accept Zambito because his state sentence was ordered concurrent to the seven year federal sentence. Dade County corrections authorities then made contact with the state prosecuting attorney to see if Zambito could be turned over to federal authorities. The prosecuting attorney approved the transfer since Zambito had a speedy trial appeal pending in the state appellate court and it was unclear how long it would be before the appeal was decided. He believed he could return Zambito to Dade County on writ if and when a trial date was set on the murder charge. Zambito was then turned over to the U.S. Marshal in Miami on

February 27, 1978, and was immediately taken to the Federal Correctional Institution in Miami which has a separate jail unit for 100 or so Marshals' prisoners.

When Zambito was transferred from Atlanta to Dade County, Florida, apparently no information regarding his cooperation in Atlanta was passed on to county authorities by Strike Force personnel or U.S. Marshals. Further, although county authorities in Martin and Dade Counties were aware of his earlier cooperation in the resolution of various local charges, this information was apparently not relayed to U.S. Marshals at Miami when he was taken back into federal custody. However, it should be noted that upon Zambito's return to Dade County in late August, 1977, he refused to cooperate further on any of the homicide charges or investigations.

Shortly after Zambito arrived at the FCI Miami jail unit, Charles Keck, a co-defendant from the Piazza drug case, was also placed in the unit. Keck had cooperated in the case also and initial steps had been taken to place him in the Department of Justice Witness Protection Program at the request of Strike Force Attorney McCulley, although Keck had not yet agreed formally to enter the Program. McCulley had written to the Bureau of Prisons on October 25, 1977 (Attachment #5) and set forth the need for the separaton of Keck from his co-defendants, including Zambito, Centoducati and Corbin. Based on that letter, Keck was assigned to the Federal Correctional Institution at Seagoville, Texas, and was designated a Bureau of Prisons Central Monitoring Case (CMC). CMC status is designed to protect government witnesses from being placed in the same institutions with persons from whom they need to be separated. When Keck was taken from Seagoville on writ to Miami in March, 1978, the Bureau of Prisons procedures failed to take into account that Keck could be held at a jail facility with a co-defendant from whom he needed to be separated. The Bureau of Prisons has since Zambito's death corrected this deficiency which could have led to serious consequences for Keck had Zambito wanted to harm him.

While Zambito was in the FCI Miami, Strike Force Attorney McCulley visited Keck on March 10, 1978, along with two DEA agents. During that visit McCulley was told by Keck that Zambito was also in the jail unit. Although surprised by this, McCulley took no steps to inquire into the reason for Zambito's presence in the unit even though he knew that, at a minimum, Zambito and Keck were to be separated from each other.

After Zambito arrived at FCI Miami, steps were taken to assign him to an appropriate federal institution to serve his seven year sentence. The FCI Case Management Coordinator, who has designation authority, requested Zambito's pre-sentence report from the U.S. Probation Office in Atlanta (attachment #6). After receipt of that report and careful review, Zambito was appropriately assigned to the U.S. Penitentiary, Atlanta, Georgia, on the basis of his offense, criminal history, age, residence, and first degree murder charge in Dade County (attachment #7). Zambito remained in the FCI jail unit until March 21, 1978, when he was picked up by U.S. Marshals from Miami for transportation to the Atlanta Pententiary. At 10:00 p.m., the night before his departure, Zambito was informed of the Marshals intent to pick him up the following morning. At no time prior to his departure was he told to which facility he had been assigned, although he could easily assume he was going to the USP, Atlanta, after he learned at 10:00 p.m. that four other offenders in the jail unit were also going out the next morning with Marshals and they were being returned to Atlanta for a parole violation hearing. After the list was posted at 10:00 p.m., Zambito made no attempt to contact FCI staff concerning any fears he might have had of going to that facility.

The Marshals took the prisoners in a van to Atlanta, stopping over for one night at the Marion County Jail in Ocala, Florida. They arrived at the USP, Atlanta, at 2:45 p.m., Wednesday, March 22, 1978. The escorting Marshals reported that Zambito did not appear apprehensive about the trip, even though he apparently knew that Allan Benton, whom he had implicated in the murder and drug cases, was at that facility. It is speculated that Zambito's lack of concern might have been based on his curtailment of cooperation in Dade County on the homicide cases since the early fall of 1977. After arrival at the USP, Atlanta, Zambito was processed through the Record Office and Receiving and Discharge Section, and placed in cell 7-17, together with five other newly received inmates, in the Admission and Orientation Section of B Cellhouse at Atlanta. The A&O Section is not separated from the general population section of B Cellhouse. During the processing in at the USP, Atlanta, Zambito has several opportunities to contact staff, including periods when he could have talked confidentially, yet he never mentioned any apprehension about being assigned to that facility.

The following morning, March 23, 1978, at approximately 6:35 a.m., Zambito was fatally stabbed while in his bunk. He was pronounced dead by Dr. Joseph F. Alderete, Chief Medical Officer at the penitentiary, at 7:10 a.m. that date.

FINDINGS AND RECOMMENDATIONS

1. Based on testimony received and records reviewed during this investigation, the Board concludes that no one in the Bureau of Prisons knew or could reasonably have known either that Zambito had cooperated with federal and/or state authorities, or that he needed to be separated from any federal prisoner. The assignment to the USP, Atlanta, after review of relevant offense and demographic data was appropriate based on the information available to the Bureau of Prisons.

2. There was a breakdown in communications between the federal authorities utilizing Zambito's cooperative testimony and authorities in the U.S. Marshals Service and Federal Prison System. The Strike Force Attorney was under the impression that a letter to the sentencing judge and documentation of cooperation in the pre-sentence investigation prepared by the U.S. Probation Officer would serve to alert federall criminal justice representatives of Zambito's cooperation and his need to be separated from certain co-defendants. In fact, however, the records were not made available to the Bureau of Prisons officials responsible for assigning Zambito to an appropriate institution or to the institution officials.

The documentation of cooperation was placed in a confidential attachment to the pre-sentence investigation, and was not forwarded in full or in part to the BOP. Only after a court order dated April 3, 1978 was the attachment released to the Board (see attachment #8). The Probation Officer defended the confidentiality of the attachment as being pursuant to Federal Rule of Criminal Procedure 32(c)(3)(A) which is quoted below:

"Before imposing sentence the court shall upon request permit the defendant or his counsel if he is so represented, to read the report of the pre-sentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; . . ."

This Board recognizes that there are items that might be included in a pre-sentence investigation that should not be disclosed to a defendant. These would include, for example, a statement that a particular person, other than the defendant, provided the information which led to the defendant's conviction. They should not include information, such as in the confidential attachment to the pre-sentence investigation of Zambito, that the defendant was cooperative or that there were threats or contracts out on his life; that is information that the defendant already knows, and there is no reason not to show it to him. On the contrary, there may be good reason to show the defendant pre-sentence information related to his cooperation, to assure him that prosecutors have kept their promises to advise the court that the defendant has been cooperative.

The Probation Officer stated that he did not send the attachment to the pre-sentence investigation to the BOP because the material could only be released with a court order and furthermore, because the Bureau of Prisons has inmates working in Record Offices in its institutions, the confidentiality of the information could not be guaranteed. In fact, inmates working in Record Offices in BOP facilities have no access to pre-sentence investigations or any confidential or non-public information about other federal prisoners.

Moreover, it is important to note that the Chief U.S. Probation Officer in Atlanta indicated that it is a standard procedure in his office to routinely provide sensitive attachments to pre-sentence investigations, either in full or in summary, to the Bureau of Prisons and the U.S. Parole Commission. That procedure was not followed in Zambito's case.

Even assuming that the information about Zambito's cooperation should have been provided in the pre-sentence report to the Bureau of Prisons, the Board feels that the Strike Force Attorney was careless in failing to take steps to insure that when Zambito came into federal custody, U.S. Marshals and prison authorities would have knowledge of his cooperation with the government and his resulting need for separation from certain co-defendants. The Board recognizes, however, the complexities of the federal criminal justice system and the likelihood of a prosecutor not knowing that information about a defendant's cooperation, which had been communicated to the sentencing judge and U.S. Probation Officer, would not be passed

to the BOP when the person comes into federal custody to serve the sentence imposed.

In addition, the Strike Force Attorney had no Justice Department Regulation or instruction to look to in handling a case of a cooperating witness who did not wish to be placed in the Witness Protection Program. McCulley does not recall specifically offering Zambito the Department of Justice Witness Protection Program but does recall that Zambito believed he could take care of himself. This, coupled with his knowledge that Zambito had been involved in homicides and thus would be himself feared by other co-defendants, and his knowledge that Zambito was in the primary custody of the Florida authorities and thus would not be coming into contact with co-defendants, caused his concern for Zambito's safety to lessen. In addition, McCulley felt that information about Zambito's cooperation would be passed by the Atlanta U.S. Marshals to Dade County authorities upon his transfer in late August 1977. Nevertheless, the Board believes that the Strike Force Attorney knew or should have known that a letter to the Bureau of Prisons, such as the one written in behalf of co-defendant Keck, and also co-defendant Piazza (attachment #9) could have been sent to insure that Zambito would be separated from other co-defendants at such time as he came into federal custody to serve the seven year term.

The Board also believes that the Strike Force Attorney should have contacted the warden at FCI Miami or other BOP authorities on or after March 10, 1978, when he learned from Zambito's co-defendant Keck that Zambito was in the jail unit at FCI Miami with him. McCulley knew these two men were to be separated, and yet apparently his only concern at the time was whether he should seek a chance to interview Zambito with regard to another drug investigation that was being conducted.

RECOMMENDATION 1

That it be the responsibility of the federal prosecutor handling a case involving cooperating witnesses to alert the U.S. Marshals Service and the Bureau of Prisons to the fact that someone who is to be taken into custody has been a cooperating witness and to specify the names of individuals from whom that witness is to be separated. Instructions of this effect should be included in the U.S. Attorneys Manual and by other means disseminated to federal prosecutors. The security and safety of cooperating witnesses should be emphasized at orientation and training programs for U.S. Attorneys, Assistant U.S. Attorneys and other Department of Justice attorneys.

RECOMMENDATION 2

That the Administrative Office of the U.S. Courts, Probation Division, should develop procedures for all U.S. Probation Officers to follow regarding the dissemination to U.S. Marshals and Bureau of Prisons personnel of information of a sensitive or confidential nature, particularly information regarding cooperation of a convicted defendant and the identity of persons from whom he needs to be separated. Those procedures should include the handling of confidential attachments to pre-sentence investigations, including the possibility of extracting from any such attachments information that is needed by the U.S. Marshals and the Bureau of Prisons to insure the safety of cooperating witnesses in federal custody.

RECOMMENDATION 3

That the Bureau of Prisons review the operation of institution Record Offices with respect to inmate access to confidential information regarding other inmates such as pre-sentence reports. The Board believes that the Bureau of Prisons must take steps to instill confidence in U.S. Probation Officers and others with respect to the confidentiality of prisoner records. Although no evidence was uncovered during this inquiry of inmates having access to confidential records, the lack of trust with regard to the safeguarding of these records must be dispelled. The Board recommends that information about Record Office operations and the resulting maintenance of confidentiality of inmate records be widely publicized at U.S. Probation Officer training sessions by Bureau of Prisons personnel.

3. The Board was alarmed by the lack of documentation in the U.S. Marshals office in Atlanta concerning the Zambito case. The placement of Zambito in Cobb County Jail in May through August 1977 under an assumed name was arranged through the U.S. Marshals Office after contact by the Strike Force agents working on the investigation. His placement in that facility was to keep him separated from co-defendants Keck, Piazza, and Benton who were being held at the Fulton County Jail and about whom Zambito was providing incriminating information. The

arrangements for Zambito were worked out orally without any written documentation. Part of the apparent problem in the Marshal's Office in Atlanta is the fragmentation of responsibility within the office with regard to sensitive cases, particularly sensitive prisoner witnesses. No one person in that office is responsible for these cases, as is the case in the U.S. Marshals Office in Miami. It is noted, however, that the Miami Marshals office has a significantly higher number of sensitive cases than does the Atlanta Marshals office. Had there been documentation in the Atlanta Marshals office on Zambito's case, the information could then have been provided to Dade County authorities and the U.S. Marshal in Miami for future reference because of the federal term that was to be served at some future date.

RECOMMENDATION 4

The U.S. Marshal in Atlanta should require written support for any request for special handling of a federal prisoner, such as the need for separation from co-defendants because of cooperation or threats against his safety. In addition, upon transfer of a cooperative prisoner from the district, U.S. Marshals should be required to review existing documentation on the prisoner within the district and verbally report relevant information to authorities accepting jurisdiction of the prisoner and, in cases where a federal sentence is pending to the U.S. Marshal in the jurisdiction where the prisoner is located.

RECOMMENDATION 5

The Board found the Bureau of Prisons procedures relating to the handling of central monitoring cases to be in need of strengthening in the following areas:

(a) A means of placing immediately after notification to the Bureau of Prisons the names of witness protection or cooperating witnesses and the persons from whom they are to be separated on the computerized central list of CMC cases. The CMC policy provides for a due process procedure prior to final designation as a CMC case. In order to avoid delay in getting needed information to persons making prison assignments, the names of these individuals should be tentatively placed on the computerized list.

(b) Bureau of Prisons institutions should be advised that separation from co-defendant cases should be processed according to the CMC policy without delay, and in no case should this process take longer than 30 days.

(c) Central Office CMC staff should develop a method of followup on cases which have not been processed within 30 days by the institution.

(d) Procedures should be implemented to monitor the movement of CMC separation cases while out of the designated institution on writ.

4. The Board of Inquiry found the prisoner processing-in procedures at the USP, Atlanta, to be in need of strengthening. After Zambito's arrival at that institution on March 22, 1978, and some initial processing, he was placed in the Admission and Orientation Section of B Cellhouse. The prisoners in this section are not separated from other prisoners in the Cellhouse.

The Board also found there was no screening of the presentence investigation by a case manager prior to Zambito's arrival at that facility even though the pre-sentence investigation had been received at that institution from FCI Miami on March 8, 1978.

RECOMMENDATION 6

The Board recommends that all Bureau of Prisons facilities establish a prisoner intake screening procedure whereby newly received prisoners are interviewed by a case manager or other responsible staff member. The case manager should review the presentence investigation when available and any other information about the prisoner prior to this interview. The interview should take place during the first work day after the prisoner is received and until the interview is completed, the prisoner should not be placed in an open part of the institution. During the interview, the case manager should specifically ask the prisoner if he knows of any reason why he could not be placed in the general population of that institution. The case manager can during this time verify the appropriateness of the designation, determine if the inmate can be placed in population in terms of his physical appearance and maturity and screen for psychological and emotional problems.

In addition to this interview, the Board recommends that presentence investigations be reviewed upon receipt and that if any attachments or sensitive material is noted and not attached, it be requested immediately.

5. The Board members were impressed with the conscientiousness of the designations officer and a case manager at FCI Miami. The designations officer took every reasonable step to review Zambito's situation before he was assigned to the USP, Atlanta. The case manager, when interviewed, related a situation not involving Zambito, but demonstrating his concern and care when handling cases involving prisoners who need to be separated.

The FCI Miami is a new institution, which shortly after it opened started using one of its four units as a detention facility because Dade County could no longer accommodate federal detainees for the U.S. Marshal. It was not designed for that purpose and thus has had to resolve some difficult logistical problems so that jail prisoners do not mix with the regular population of that facility. A new jail unit is now under construction at the FCI and when completed in early 1979 should eliminate several logistical problems. Currently, prisoners in the general population can come directly up to the front windows of the jail unit and thus can identify prisoners in the unit. As happened in this case, two prisoners in the general population could easily identify Charles Keck and Zambito in the jail unit and pass on information about their status as cooperating witnesses, thus increasing possible risks to their safety.

While in Miami, the Board members met with the Attorney in Charge of the Miami Strike Force and learned that he had never visited the FCI and was unaware that cooperating witnesses could be identified by prisoners in the general population. This lack of knowledge of another criminal justice agency procedure was found prevalent among all representatives of the different agencies we met with during this inquiry.

The Board also learned that when prisoners are designated to federal institutions they are never told by staff to which institution they are assigned. This policy was adopted to avoid a prisoner or his family from attempting to change a designation after it had been made.

RECOMMENDATION 7

That the Bureau of Prisons should review the assignment of any CMC separation case prior to placement in the FCI Miami, both general population and jail unit, so that prisoners who need to be separated are not placed in the institution together. At least until the new jail unit is completed, the Board members believe that adequate protection cannot be afforded to cooperating witnesses whose identity can be disclosed by another prisoner in either the jail or general population.

RECOMMENDATION 8

That U.S. Attorneys and Strike Force attorneys be urged to visit federal correctional facilities in their area so that they can become familiar with Bureau of Prisons operations, particularly in reference to witness protection or security prisoners.

RECOMMENDATION 9

That upon designation of an institution for a prisoner, the prisoner be advised of that assignment so that if he knows of a reason why that assignment would be inappropriate, he can make his feelings known to the U.S. Marshal or Bureau of Prisons staff. Prisoners should not be advised any earlier than necessary of the day or time they would be transported so that the safety of the escorting Marshal or Bureau of Prisons staff will not be jeopardized.

6. Interviews with representatives from the Dade County Public Safety Department revealed that although Zambito had been a cooperating witness in a number of significant investigations, this information was not relayed to the Miami U.S. Marshal when Zambito was placed into federal custody in February, 1978. Apparently Dade County assumed the federal government was aware of Zambito's cooperation (Zambito had not been cooperating with Dade County authorities for some months before he was placed in federal custody).

RECOMMENDATION 10

That state authorities be encouraged to share with U.S. Marshals information about cooperation from prisoners they are about to turn over to federal authorities.

7. The recent Department of Justice Task Force has recommended the establishment of a Witness Security Review Board under the Deputy Attorney General to serve in an advisory capacity on matters involving government witnesses.

RECOMMENDATION 11

If such a Review Board is established, this Board recommends that a representative from the Bureau of Prisons be assigned to the group. The Bureau of Prisons has over 125 prisoners currently in custody under the Witness Protection Program and an additional 400–500 cooperating government witnesses in their institutions. The Bureau of Prisons should therefore also be represented on the proposed Witness Security Review Board.

In conclusion, the Board found the case of William Rhett Zambito was an unusual one because so many different state and federal criminal justice agencies were involved. Although the Board believes that the criminal justice system generally works well on the whole, in this case there were breakdowns in communications between the different agencies that resulted in certain critical information not being passed on. We found, as reflected above, that most persons interviewed understood and were concerned primarily with their own aspect of the system and did not know much about other areas and about precisely what other agencies did. As a result, assumptions were made that were wrong and that ultimately contributed to Zambito's death. The Board believes misunderstandings about the various components of the criminal justice system on the part of the personnel we interviewed are no different from those that would be made by most peple in the field. Efforts must be made to improve the relationships and interrelationships within the entire system and to insure that there is no possibility of communication gaps and uncertain responsbility of the sort that we found in this instance.

Finally, we would like to thank everyone who assisted us in this inquiry for their excellent and forthright cooperation.

Respectfully submitted.

J. MICHAEL QUINLAN,
Chairman, Executive Assistant to the Director, Federal Bureau of Prisons.
JUDITH BARTNOFF,
Special Assistant to the Deputy Attorney General.
JEROME BULLOCK,
U.S. Marshal, District of Columbia.
JAMES A. MEKO,
Correctional Programs Specialist Federal Bureau of Prisons.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

24 MAR 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is with further reference to your February 1 letter requesting information regarding the Witness Security Program. I have previously submitted the requested report regarding the Zambito matter.

With respect to the procedures governing criminal history information, I am enclosing a copy of the letter describing the present system for exchange of information. I hope this will be responsive to your question.

As you know, the Department policy regarding disclosure of witness identity has always been to encourage witnesses to meet their legal obligations. This general policy was strengthened last April. Under our current procedures, witnesses are reminded at the time they enter the Program that they are personally responsible for all past and future debts and that their refusal to meet these obligations could compromise this security. When debts become known to the Marshals Service, witnesses are reminded of their obligations and the opportunity to make payment through the Marshals Service in a secure manner. If a witness refuses payment, efforts are made to determine if the debt is valid. If so, the matter is referred to the Criminal Division for a determination as to whether the identity and location of the witness will be disclosed. Determinations are made on a case-by-case basis weighing the significance of the debt against the risk that disclosure would pose to the life of the debtor. Before disclosure is made, the witness is given final notice in writing that he has thirty days within which to honor his obligation.

Question four requests statistical reports of the Witness Security Division. The requested reports are attached hereto.

Question five seeks a copy of the Memorandum of Understanding (MOU) between the Department and protected witnesses. Because we believe that public dissemination of our standard MOU might reveal detailed information regarding our procedures which could be used by the criminal element to breach the security of the program, it is our policy to treat the MOU as a classified document that is unavailable for public distribution. As we recognize the legitimate interest of the Subcommittee in access to the information contained in this document, however, we will be pleased to dispatch a representative of the Department to bring a copy of the document to your offices for review by Subcommittee Members or staff with the understanding that the document so provided for inspection will be reviewed while the Department representative stands by. While we appreciate that this procedure may be somewhat inconvenient and may appear to be overly cautious on our part, we trust that you understand the responsibility we feel for protecting participants in the Witness Security Program and our resulting desire to avoid taking any action which could compromise the security of the Program. If the review procedure suggested above is satisfactory to you, please have your staff telephone Cary Copeland (633-4117) of this office to arrange for delivery of the MOU to your offices for inspection.

Finally, with respect to your question regarding the new management information system, the Witness Security Division has designed and programmed an extensive computerized information system which enables the almost instantaneous retrieval of case records. The majority of case data, to include information relative to relocation, documentation, employment and court appearances, has been input. The Division anticipates the provision of additional memory storage early this Spring which will allow for completion of the remaining case history data input.

The financial transaction records were fully automated in 1981. This system has greatly enhanced the Division's response capability in providing prosecutors with funding histories to be used in court proceedings, as well as providing statistical management summaries previously unavailable because of the many employee hours required for their preparation.

Of course, I hope the information previously supplied and that provided herein is fully responsive to your inquiry and that you will not hesitate to let me know if you have questions or require further information regarding this or any other matter.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Enclosure

May 17, 1982

Honorable William E. Hall
Director
U. S. Marshals Service
1 Tysons Corner Center
McLean, Virginia 22102

Dear Bill:

This is to confirm the decisions reached at the meeting held on April 26, 1982, which was attended by Howard Safir, Assistant Director of Operations, U. S. Marshals Service; Frederick D. Friedman, Special Assistant to the Associate Attorney General; Gerald Shur, Associate Director, Office of Enforcement Operations, Criminal Division, U. S. Department of Justice; James Kennedy of the Drug Enforcement Administration; John E. Otto, Executive Assistant Director; Conrad S. Banner, Inspector-Deputy Assistant Director, Identification Division; Sean M. McWeeney, Section Chief, Organized Crime Section; Melvin D. Mercer, Jr., Section Chief, Identification Division; and Patrick J. Foran, Unit Chief, Organized Crime Section, at FBI Headquarters (FBIHQ).

At this meeting a tentative agreement was reached relative to procedures being utilized by the FBI Identification Division on responding to fingerprint queries by state and local agencies on relocated witnesses. As you are aware, the Organized Crime Section at FBIHQ places a stop on all relocated witness records when the individual is placed in the Witness Security Program. This stop in the past has been placed using the individual's true name and a stop generally has not been placed on the relocated witness' new identity name. In the past the Identification Division at FBIHQ would notify the Witness Security Section of the U. S. Marshals Service at the time of a query. The Witness Security Section would then advise the Identification Division as to whether or not to respond to the query in a routine manner or if it was necessary for an FBI Agent to hand carry the response to the concerned agency, and advise an official in a high-level position of the fact that the individual is a relocated witness and needs special protection.

As you are aware, in the recent past a local law enforcement official made an inquiry of the FBI Identification Division regarding Marion Albert Pruett under his new identity name Charles

Pearson. As a result of a technical mistake in reviewing the fingerprint card submitted under the name Charles Pearson the local law enforcement authority was advised by the FBI Identification Division that there was no record on file relating to Pearson. In fact, there was a record on file for Pearson but it was under the name of Marion Albert Pruett.

As a result of this technical mistake, it has been determined that had the FBI Identification Division had Pruett's new identity name, i.e., Charles Pearson, a name search check would have revealed this record and the local law enforcement requester would have been appropriately advised.

In view of the above-described circumstance, it has been agreed that the Witness Security Section of the U. S. Marshals Service will place into effect the following procedures for placing stops in the FBI Identification Division for all individuals currently in the Witness Security Program and for those who will be placed in the Witness Security Program in the future:

1. Upon admittance of an individual into the Witness Security Program, the Witness Security Section of the U. S. Marshals Service will request, in accordance with the provisions of the U. S. Attorneys' Manual, Chapter 9-21.000, that a stop be placed in the FBI Identification Division on the records of individuals being placed in the program.

2. When a new name and identity has been given by the Witness Security Section, U. S. Marshals Service, to the relocated witness, this name and new descriptive data will be provided to the Identification Division of the FBI by the U. S. Marshals Service in order that a stop may be placed in the Identification Division regarding the individual's new name.

3. When a query on a relocated witness is received by the FBI, the Identification Division will notify the Witness Security Section of the U. S. Marshals Service as to the nature of the query and who has requested it. The Identification Division will be able to make this notification on a 24-hour, 7 day-a-week basis.

Honorable William E. Hall

4. The Identification Division will not respond to queries for a period of 72 hours.

5. Within the 72-hour period the Witness Security Section, U. S. Marshals Service, will advise the Identification Division whether to respond routinely or if special handling is required.

6. If special handling is required, the Identification Division will request that a Special Agent in the appropriate field office hand carry the response to the high-level official. The Special Agent will advise that official that the subject is a protected witness and needs special protection for his/her well-being.

7. The Identification Division will send a copy of the query to the Witness Security Section, U. S. Marshals Service, and to the Office of Enforcement Operations, Criminal Division of the Department of Justice.

8. In a situation where special handling is required, a memorandum from the Witness Security Section to the Identification Division requesting this service will be prepared. A copy of that request will also be sent to the Office of Enforcement Operations, Criminal Division of the Department of Justice.

9. In a situation where special handling has been requested, the Organized Crime Section at FBIHQ will submit a memorandum to the Witness Security Section, U. S. Marshals Service, and to the Office of Enforcement Operations, Criminal Division of the Department of Justice, setting forth the results of the contact with the high-level official of the requesting agency.

The above-described procedures have been coordinated between Unit Chief Patrick J. Foran, Organized Crime Section, at FBIHQ and Phillip M. Tucker, Chief, Witness Security Program of the U. S. Marshals Service; and a format memorandum has been devised and is attached hereto for submission of the identity of an individual being admitted into the Witness Security Program and submitting that individual's new name identity to the FBI Identification Division for the purpose of placing stops on their records. It has been agreed that there will be no connection made

Honorable William B. Hall

between the relocated witness' true name and the new name identity in order that the integrity and security of this program can be maintained. Exceptions will occur when witnesses are subsequently arrested under their new names and those names are added to the arrest records maintained by the Identification Division. It is essential, however, that in submitting the true name or new name of a witness to the FBI Identification Division, that the individual's full name, first, middle and last, place of birth, date of birth, sex, race, and social security number be provided by the Witness Security Section, U. S. Marshals Service, to the Identification Division at FBIHQ.

Although the above procedures seem complicated, I concur that this procedure will best facilitate the preservation of security of the witness without abrogating the statutory responsibilities of the FBI in responding to state and local requests.

Your cooperation in this matter is greatly appreciated.

Sincerely,

William H. Webster
Director

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 28, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is with reference to H.R. 3086, the "United States Marshals Service and Witness Security Reform Act of 1983", which is scheduled for mark-up by the Subcommittee this week.

Based upon Department testimony and subsequent discussions between Subcommittee staff and officials of the Department, your staff prepared a series of amendments to H.R. 3086 which seek to address many of the concerns which we had with H.R. 3086 as introduced. Copies of these amendments are attached for ready reference; we believe these changes reflect appropriate compromises of the various issues which they address.

While I will not belabor each of the points covered by the attached amendments, I should note that we believe the amendment relating to enforcement of judgments against protected witnesses is of particular importance to the security of the witnesses affected. The attached amendment proposes deletion of that provision now in H.R. 3086 which would establish a procedure for judicial review of Department decisions not to disclose to judgment holders the new identity and location of a protected witness. We believe judicial review of such administrative determinations would be costly and time-consuming for judgment holders and that it would also impose a needless burden upon federal courts and Department attorneys.

Because the ultimate goal of the judicial review procedure is to secure compliance with the outstanding judgment, the proposed amendment would establish a procedure whereby a judgment holder could have a special master appointed by a federal court. The master could then obtain from the Department of Justice information on the identity and location of the protected witness and would be empowered to take any action that the judgment holder could take to secure enforcement of the judgment. By having

a responsible court-appointed master in charge of securing enforcement of the judgment, we believe the life and safety of the protected witness are appropriately protected. Moreover, because the master can take any action which the judgment holder could take, including the initiation of judicial proceedings in state or federal court, we believe this procedure will provide a means whereby judgments can be enforced in an effective manner. In short, we believe this alternative to judicial review accomplishes the goal of the judicial review procedure in H.R. 3086 and that is does so in a manner that safeguards the security of the protected witness.

In addition to the attached printed amendments, we believe that several other changes are needed in H.R. 3086. First, we believe that the proposed new § 3522 establishing a victim compensation fund should be deleted from the bill. As Associate Attorney General Giuliani noted in his testimony last year, the effect of this provision is to make the Government strictly liable for any offense committed by a person provided protection without regard to whether the Government was negligent in any respect. It is difficult to see any difference between § 3522 as written and a proposal that the Government be liable for any offense committed by a person who was at some time in the past a federal employee, a federal grant recipient or a federal prisoner. Unless some act or omission by the Government was a proximate cause of the offense and resulting injury, it would seem anomalous for the Government to be required to compensate for injuries committed by protected witnesses but not in other situations where there has at some point in history been a relationship between the offender and the Federal Government.

We believe the best way to compensate victims of crime is through a comprehensive victim compensation system. As you know, the President's Task Force on Victims of Crime recommended creation of a federal victim compensation program. That proposal is currently under active review within the Administration. As we believe proposed § 3522 is inconsistent with a comprehensive victim compensation program, we recommend its deletion from this bill in favor of a more comprehensive approach to victim compensation.

Second, with respect to unauthorized disclosures of information regarding protected witnesses, we recommend that the fine provided (page 4, line 18) be increased from $1,000 to $5,000. This would make the fine level consistent with that for analogous disclosures in violation of the Privacy Act of 1974 (5 U.S.C. 552a(i)).

Third, we suggest substituting the words "determine whether" for "certify" on page 4, line 23. This makes clear that, in admitting a person to the Witness Security Program, the purpose of the threat assessment is to secure an informed, discretionary

judgment based upon the best available information rather than a guarantee or warranty. Moreover, use of the word "certify" in this context could give rise to a claim that a good faith but erroneous determination exposes the Attorney General to criminal prosecution for "false certification" under 18 U.S.C. 1018 triggering the Special Prosecutor Act.

Fourth, we believe the responsibilities of protected witnesses should be expanded to include "the agreement of the person to disclose any probation or parole responsibilities." This would require persons entering the Program to advise Department officials of any probation or parole obligations which the prospective entrant may have.

Fifth, we suggest an amendment at the end of the witness security part of H.R. 3086 to read as follows: "Subsection (1) of section 2516 of title 18 of the United States Code is amended in paragraph (c) by adding '1512 and 1513' following 'section 1503.'" The reason for this change is that 18 U.S.C. 2516 has long authorized the use of court-ordered electronic surveillance in connection with the investigation of obstructions of justice. Until last year, section 1503 governed offenses involving injury to and intimidation of jurors and witnesses. In connection with the Victim and Witness Protection Act of 1982 (P.L. 97-291), however, section 1503 was amended to apply only to jurors and new sections 1512 and 1513 were enacted to apply to acts of intimidation and retaliation against victims and witnesses. The effect of revising section 1503 and adding two new sections, however, was to deprive law enforcement officials of electronic surveillance authority in connection with offenses against protected witnesses. We believe this result was inadvertent and that it undermines our ability to investigate and prosecute acts of intimidation and retaliation against protected witnesses. The suggested amendment would merely restore the authority which we had prior to the enactment of P.L. 97-291 late last year.

Sixth and finally, we suggest the following as a substitute for the language at lines 17 through 24 of page 19:

"(e) Section 568 of title 28, United States Code, is amended --

(1) by inserting '(a)' before 'Appropriations'; and

(2) by adding at the end thereof a new subsection to read as follows:

'(b) Without regard to the provisions of 3302 and 9701 of title 31 of the United States Code, the United States Marshals Service is authorized, to the extent provided in the Appropriations Act, to credit to its appropriations account all fees, commissions, and expenses collected for --

(1) the service of civil process, including complaints, summonses, subpoenas, and similar process, and

(2) seizures, levies, and sales associated with judicial orders of execution,

for the purpose of carrying out these activities. Such credited amounts may be carried over from year to year for these purposes."

Again, we appreciate the sensitivity which your Subcommittee and staff have demonstrated in approaching the difficult issues encompassed by H.R. 3086 and will be grateful for the Subcommittee's careful consideration of the amendments developed by staff as well as those proposed in this letter. If H.R. 3086 is amended as suggested above, we believe it would address the various concerns which have been raised about the Witness Security Program while at the same time preserving the safeguards necessary to protect the lives and safety of witnesses.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Enclosures

AMENDMENT TO H.R. 3086

Page 3, insert the following after line 4:

''(3) The United States shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

AMENDMENT TO H.R. 3086

Page 4, insert the following after line 11:

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph (F) of this paragraph.

AMENDMENT TO H.R. 3086

Page Page 4, line 14, add the following after the period: ''Deductions shall be made from any such payment to a person to satisfy obligations of that person for family support payments pursuant to a State court judgment.''.

AMENDMENT TO H.R. 3086

Page 4, lines 21, 22, and 23, strike out ''persons and property in the community where the person to be protected is to be relocated'' and insert in lieu thereof ''other persons and property''.

AMENDMENT TO H.R. 3086

Page 5, line 3, insert the following after the period: ''This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.''

AMENDMENT TO H.R. 3086

Page 5, lines 5 and 6, strike out ''an agreement'' and insert in lieu thereof ''a memorandum of understanding''.

In the following places, strike out ''agreement'' and insert in lieu thereof ''memorandum of understanding'':

Page 5, lines 6, 21, and 24.

Page 6, lines 5, 7, 19, and 21.

Page 8, lines 4 and 15.

AMENDMENT TO H.R. 3086

Page 5, line 17, strike out ''and''.

Page 5, insert the following after line 17:

''(D) the agreement of the person to comply with civil judgments against that person,

Page 5, line 18, strike out ''(D)'' and insert in lieu thereof ''(E)''.

Page 5, line 20, strike out the period and insert in lieu thereof '', and''.

Page 5, insert the following after line 20:

''(F) the agreement of the person to designate another person to act as agent for the service of process.

AMENDMENT TO H.R. 3086

Page 6, lines 9 and 10, strike out ''responsibilities under paragraphs (1) and (2)'' and insert in lieu thereof ''any responsibilities under this chapter''.

Page 6, line 13, strike out ''or'' and all that follows through ''case,'' on line 14.

Page 6, line 16, strike out the period and insert in lieu thereof ''(insofar as the delegation relates to a criminal ~~civil~~ rights case), or to one other officer or employee of the Department of Justice.''.

AMENDMENT TO H.R. 3086

Page 7, lines 8 and 9, strike out ''the Attorney General'' and insert in lieu thereof ''that person or an agent designated by that person for that purpose.

Page 7, line 13, strike out ''and,'' and all that follows through ''judgment'' on line 16.

AMENDMENT TO H.R. 3086

Page 8, strike out line 17 and all that follows through page 9, line 8, and insert in lieu thereof the following:

''(2)(A) Any person who holds a judicial order or judgment entered by a Federal or State court in his favor against a person provided protection under this chapter shall, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, have standing to petition the United States district court in the district where the person holding the order or judgment resides for appointment of a special master.

''(B) Upon a determination that (i) the petitioner holds such a Federal or State judicial order or judgment and (ii) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person with respect to whom the order or judgment was entered, the court shall appoint a special master to act on behalf of the petitioner to enforce the order or judgment. The clerk of the court shall forthwith furnish the master with a copy of the order of appointment. The Attorney General shall disclose to the master the current identity and location of such protected person and any other information necessary to enable the master to carry out his

duties under this paragraph.

''(C) It is the duty of the master to proceed with all reasonable diligence and dispatch to enforce the rights of the petitioner. The master shall, however, endeavor to carry out his enforcement duties in a manner that minimizes, to the extent practicable, the safety and security of the protected person. In no event shall he disclose the new identity or location of the judgment debtor without the permission of the Attorney General. Any good faith disclosure made by the master in the performance of his duties under this paragraph shall not create civil liability against the United States.

''(D) Upon appointment, the master shall have the power to take any act with respect to the judgment or order which the petitioner could take including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law.

''(E) The costs of this action and the compensation to be allowed to a master shall be fixed by the court and shall be apportioned among the parties as follows: the creditor shall be assessed in the amount he would have paid to collect on his judgment in an action not arising under the provisions of this paragraph; the debtor shall be assessed the costs which are normally charged to debtors in similar

actions and any other costs which are incurred as a result of an action brought pursuant to this paragraph. In the event that the costs and compensation to the master are not met by the creditor or debtor, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of an action brought pursuant to this paragraph.

AMENDMENT TO H.R. 3086

Page 9, line 20, strike out ''section 1963 of''.

AMENDMENT TO H.R. 3086

Page 15, strike out lines 1 through 6 and redesignate the succeeding subsection accordingly.

AMENDMENT TO H.R. 3086

Page 19, strike out lines 17 through 24 and insert in lieu thereof the following:

''(e) Notwithstanding the provisions of section 3302 of title 31, United States Code, the United States Marshals Service is authorized to credit fees collected for the service of civil process, including complaints, summonses, subpenas, and similar process performed by the United States Marshals Service to its current appropriation account in the amount approved by the Annual Appropriation for the purpose, only, of carrying out these activities.''.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 28, 1983

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of July 3, 1983 which asks for additional information about the Witness Security Program.

The following is in response to your questions:

1. The numbers of protected witnesses involved in visitation or custody disputes? The frequency of visitation compared to extant court orders? The nature and extent of any non-compliance with court orders by protected witnesses? The estimated cost of securing full compliance with court orders relating to visitation?

ANSWER: Three cases are presently pending in the federal courts involving visitation and/or custody disputes in which the United States is a party. These cases are Ruffalo v. United States, et al., W.D.MO.; Franz v. United States et al., D.D.C.; and Salmeron v. United States, et. al., 9th Cir. Ruffalo and Franz were recently remanded from the Court of Appeals to United States District Court.

The Witness Security Division of the United States Marshals Service has established a roster of existing judicial custody and visitation decrees affecting participants in the Program. At present, there are no historical statistics available comparing actual visits with those scheduled by the court. Present Program policy is such that continued participation in the Program is predicated on a witness abiding by all custody and visitation orders. Security requirements, as well as travel arrangements, unfortunately, but necessarily,

limit the frequency and the freedom of visits between Program children and non-Program parents. The Marshals Service proposes monthly visits in a neutral area at the expense of the Service. It is estimated that travel, hotel accommodations, and Marshals Service security expenses will cost approximately $50,000 per year per family case.

2. Number of protected witnesses killed or assaulted while in the Program? Please provide a factual summary of each incident?

Answer: To our knowledge, no witness living within the security guidelines of the Program has been killed or harmed by those against whom he/she has testified while under the active protection of the United States Marshals Service. Sixteen individuals, however, have been killed as a result of their returning to the danger area or breaching their security. Brief summaries of the circumstances of these deaths follow.

STEVEN ALMOND -- Mr. Almond entered the Program in July 1978, at the request of Florida State prosecutors. He voluntarily terminated his participation in the Program in December 1978. In July 1983, Mr. Almond was shot to death in Sacramento, California.

The investigation into this matter is still open. Preliminary information, however, indicates that Mr. Almond's death was not related to his testimony, but rather a result of his reestablishing his ties with the criminal community.

NESTOR AYIOTIS (Prisoner witness -- authorized for secure transportation between BOP facilities only.) Upon his release from jail in July 1981, further Services of the Program were not authorized because it was determined he was no longer in danger as a result of his testimony. In July 1983, Mr. Ayiotis was shot and killed by two assailants on the streets of New York.

JOSEPH BARBOZA -- Mr. Barboza was relocated by the Department of Justice in 1969, prior to the creation of the Witness Security Program. In December 1971, Barboza was convicted of murder in his relocation area (California) and sentenced to 5 years to life in prison. He was paroled in October 1975. The terms of his California parole prevented him from leaving the State of California. The Department offered to assist the State of California by providing documentation for a new identity for Mr. Barboza, but not to re-admit him to the Program because of the murder he committed. We were in the process of furnishing him new identity documents when he was shot as he was entering his automobile in San Francisco on February 22, 1976. One defendant has been convicted and it is believed that Barboza's murder was related to his testimony. The investigation is still open.

JAMES BERRY -- Mr. Berry entered the Program in June 1974, as a result of his testimony against a narcotics distribution ring in northern Indiana. Mr. Berry became involved with criminal elements in his relocation area. He and a friend had robbed several individuals of money and narcotics. In retaliation, he was kidnapped and murdered in September 1974 in Fort Worth.

SHEILA BISHOP -- Ms. Bishop entered the Program in November 1978, as a result of information she provided relative to a heroin/cocaine network operating in New York and Baltimore. After her relocation to Little Rock, Ms. Bishop became involved with local criminals. Her body was found July 19, 1980. She had been shot in the back of the head. An independent FBI investigation concluded that there was no connection between Ms. Bishop's death and her previous testimony, but rather was a result of her intimate knowledge of local criminal activity, including narcotics and murder. Three individuals were charged with her murder; two pleaded guilty to and the third was convicted of first degree murder.

VINCENT JOSEPH ENSULO -- Mr. Ensulo entered the Program in December 1973 and was relocated to a safe area. Three weeks later, Ensulo left his relocation area and returned to New York. Ensulo then relocated himself and was provided with limited funding by the United States Marshals Service until April 1974, when he was terminated. Sometime after that, he again returned to New York and worked as a cab driver. On April 14, 1978, Ensulo was shot and killed in New York near the cab company where he worked. One of the defendants against whom he testified in 1974 was arrested and charged with his murder.

GEORGE EARL FONCANNON -- Mr. Foncannon entered the Program in July 1977, but voluntarily terminated his participation six weeks later on August 24, 1977. He returned to his primary danger area, Indianapolis, where he was recently shot on March 30, 1983.

GARY ANTHONY GROSS - Mr. Gross entered the Program on April 27, 1977. Three days later, he left his relocation area and returned to his home in Ohio. He was shot in Cleveland on January 20, 1980.

DONNA HOLLEY -- Ms. Holley entered the Program in February 1976, after testifying in a heroin smuggling case. Ms. Holley was relocated, but left her relocation area in August 1976. She

subsequently died of multiple gunshot wounds in Detroit, her primary danger area, on September 16, 1978.

DANIEL LaPOLLA -- Mr. LaPolla was authorized for Program services in May 1972. These services were limited to funding of $65 per week provided by the United States Marshals Service. Physical protection and relocation assistance were provided by the Bureau of Alcohol, Tobacco and Firearms. Mr. LaPolla was relocated by the Bureau of Alcohol, Tobacco and Firearms in mid-April 1972. On September 24, 1972, LaPolla's brother died in Providence, Rhode Island. On September 25, 1972, three Bureau of Alcohol, Tobacco and Firearms agents took LaPolla to the wake. Several of the defendants against whom LaPolla was to testify appeared at the wake and were denied entrance. As a result, a dozen Bureau of Alcohol, Tobacco and Firearms agents and police officers provided protection at the funeral on September 27, 1972. Immediately after the funeral, two Bureau of Alcohol, Tobacco and Firearms agents took LaPolla back to his relocation area and instructed him to stay out of Providence, Rhode Island and Oneco, Connecticut. LaPolla agreed.

On September 29, 1972, LaPolla called a Bureau of Alcohol, Tobacco and Firearms agent and, in the course of the conversation, was instructed not to leave his relocation area under any circumstances. Three hours later, LaPolla was killed in an explosion at his residence in Oneco, Connecticut (the danger area). The explosive device was apparently attached to the lock on the front door, and LaPolla triggered it when he unlocked the door. The defendants against whom LaPolla was to testify were convicted of his murder.

LETHA LYNCH -- Ms. Lynch entered the Program in September 1976 and was relocated. Three months later, she voluntarily terminated her participation in the Program and later returned to Cleveland, her primary danger area. On September 1, 1980, Ms. Lynch's body was found in Cleveland, the apparent victim of a robbery.

CHRISTOPHER REED MAUNEY -- Mr. Mauney entered the Program in March 1977. According to statements from his neighbors, it appears that Mr. Mauney became involved in the sale of drugs after his relocation to Detroit. On April 4, 1978, Mr. Mauney was shot and killed by an individual in his neighborhood.

EUGENE McCRAY -- Mr. McCray entered the Program in March 1979. He was relocated, but left his relocation area without notifying the Marshals Service and moved to live with one of his sisters in a danger area. On January 10, 1982, while playing cards, Mr. McCray got into a rather heated argument, during which he was shot. He subsequently died from the wounds.

MICHAEL PAPA -- Mr. Papa was authorized as a prisoner witness from New York in August 1974. Upon his release from prison, no further protective services were authorized for him by the Department of Justice. Protection was authorized for his family, but they left the relocation area within four months and returned to New York. Mr. and Mrs. Papa were murdered in their New York apartment in September 1982. Police suspect that their murders may have been connected to an unsuccessful narcotics transaction.

ROOSEVELT RICHARDSON -- Mr. Richardson entered the Program in May 1975, as a result of information he had provided in a heroin distribution ring. He was relocated, but without notifying the Marshals Service, returned to visit a girlfriend in Atlanta, his primary danger area. Mr. Richardson and his girlfriend were stabbed at her apartment on July 18, 1975. Both died as a result.

ROSEMARY ROSALES -- Ms. Rosales entered the Program in October 1977, as a result of testimony she provided concerning a Los Angeles based heroin distribution operation. She was relocated, but left her relocation area in February 1978. She was found dead on September 2, 1982, at her place of employment near Los Angeles, having been shot several times at close range. The investigation into her murder is still open.

In summary, only two of the sixteen murders appear to have been motivated by the victims' cooperation with law enforcement (Joe Barboza and Daniel LaPolla).

3. The number of persons killed by a protected witness (broken down by year)?

Answer: According to records maintained by the Witness Security Division, 6 witnesses have been convicted of having committed murders in their relocation areas. To our knowledge, an additional four witnesses have been convicted for murders they committed, subsequent to their voluntary termination from the Program and return to their danger areas.

These witnesses were arrested in the following years:

Relocation area	Danger area
1977 - 1	1982 - 2
1979 - 1	1983 - 2
1981 - 1	
1982 - 3	

Information relative to any crimes committed by former participants in the Program is generally provided to the Marshals Service by either the Federal Bureau of Investigation or the arresting agency. Consequently, in the absence of a report, the Service may not be aware of crimes a former witness may have committed.

The number of felonies committed by protected witnesses (by year)?

Answer: The General Accounting Office is preparing a report on this subject which should be available in the near future.

4. What legislation, if any, is necessary to assure that persons with child support court orders will be able to obtain deductions or garnishment of the subsistence payments made to protected witnesses?

Answer: In an opinion paper prepared by the Chief Counsel's Office dated March 3, 1977, the Internal Revenue Service interpreted subsistence funding provided by the Marshals Service to relocated witnesses as being similar to welfare payments. Because this funding was not construed to be payment for services and because it was expended so as to ensure the health and safety of the witness, it was determined by the Internal Revenue Service that monthly subsistence allowances did not fall within the category of gross income.

In an effort to assist the witness during his period of transition and until he becomes self-sufficient, the Marshals Service proposes that a witness' monthly subsistence allowance be increased to include his existing court-ordered child support responsibilities. Consequently, if at the time a witness entered the Program, he had been ordered by the court to provide financial support for two children from a previous marriage who were not being relocated with him, his monthly funding would be increased to include up to the amount of monthly support he had been ordered to provide. This additional funding would not exceed the monthly support ordered by the court nor would it exceed the scheduled funding allotment for a family of three in this case where there were two children from a previous marriage. These monies would be provided to the witness with the understanding that if he did not make payment to the proper authorities having jurisdiction in this matter, that the funding would cease and his non-compliance could result in his termination from the Program and jeopardize his security.

5. What options are currently available for a person whose participation in a criminal case as witness poses a serious risk of personal injury other than placement in the Witness Security Program? Has the Department considered the use of relocation of witnesses without the provision of a new identity? What are the merits and demerits of such an approach?

Answer: Applications for admission are reviewed in light of providing only those services to witnesses that are absolutely necessary. The Marshals Service has provided witnesses with temporary relocation away from the danger area during the course of a trial.

Temporary relocations are done for several reasons. In some cases, the witness himself has asked that relocation be temporary because he intended to return to the danger area after the trial was over. In other cases, temporary relocation is done when a full relocation is not deemed necessary (i.e., when the witness is to be deported after testimony is completed or it is felt that there is no further danger after the trial is over). The services provided during temporary relocations depend entirely on the circumstances of each case.

New identities have always been provided when a witness is permanently relocated. Without a new identity a witness could be traced to his new location. If the danger to a witness is considered significant enough to justify a permanent relocation, a new identity must be provided to ensure that the witness is not found. To provide one without the other could be self defeating.

6. Please outline in detail the exact relationship between the Marshals Service, the Federal Bureau of Investigation and state and local law enforcement authorities with respect to access to the pertinent criminal histories of protected witnesses.

Answer: The procedures presently followed by the Marshals Service and the Federal Bureau of Investigation relative to the provision of criminal history information to state and local law enforcement are as follows:

a. Upon admittance of an individual into the Witness Security Program, the Witness Security Division of the Marshals Service will request that a "stop" be placed in the Federal Bureau of Investigation Identification Division on the records of individuals placed in the Program. This request is made in accordance with provisions of the U.S. Attorneys' Manual, Chapter 9-21.000.

b. As soon as a new name and identity has been established, the Marshals Service Witness Security Division will provide the Federal Bureau of Investigation Identification Division with the new name and descriptive data necessary to enable the Federal Bureau of Investigation to place a "stop" regarding the individual's new name.

c. When an inquiry is received by the Federal Bureau of Investigation, the Identification Division will notify the Witness Security Division as to the nature of the query and the requestor. This notification is made on a 24-hour, 7-days-a-week basis.

d. Pursuant to the Marshals Service agreement with the Federal Bureau of Investigation, the Witness Security Division is given 72 hours to respond to the inquiry. Generally, however, the Witness Security Division responds in less than 72 hours.

e. Within the 72-hour period, the Witness Security Division will advise the Identification Division whether to respond routinely or if special handling is required.

f. If special handling is required, the Identification Division will request that a Special Agent in the appropriate Federal Bureau of Investigation field office hand carry the response to a high-level official in the requesting agency. The Special Agent will advise the requesting official that the subject is a protected witness and requires special protection for his/her well-being (e.g., segregation while in custody).

g. The Identification Division will send a copy of the query to the Witness Security Division and to the Office of Enforcement Operations, Criminal Division of the Department of Justice.

h. In a situation where special handling is required, the Witness Security Division will send a memorandum to the Identification Division requesting this service. A copy of this request will also be sent to the Office of Enforcement Operations.

i. In a situation where special handling has been requested, the Organized Crime Section at Federal Bureau of Investigation headquarters will submit a memorandum to the Witness Security Division, with a copy to the Office of Enforcement Operations, setting forth the results of the Federal Bureau of Investigation's field contact with the requesting agency.

In addition to requests for data made through the submission of fingerprints, local and state law enforcement agencies have the ability to obtain criminal histories by utilizing computer queries to the Interstate Identification Index System. In the absence of actual fingerprints or a Federal Bureau of Investigation number, the Bureau cannot make an absolute identification.

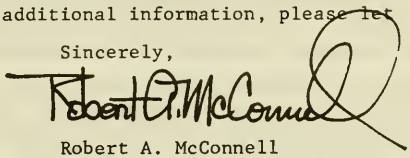
All first arrests occurring after 1974, be they of Program participants or non-Program participants, are automatically computerized. No distinction, however, can be made between the first arrest of a protected witness, as opposed to other initial arrests occurring after that date.

State and local law enforcement agencies policies vary from department to department with respect to submitting requests for criminal histories. Some agencies request criminal histories on all arrest records, while others do not submit misdemeanor requests unless personal injury is involved or the individual is not known locally. If the individual has not been identified as a protected witness and the agency does not pursue the record, no information would be provided. When criminal records are released, there is no distinction between felony or misdemeanor arrests. The entire criminal history (rap sheet) is provided.

As previously explained, the release of criminal history information to requesting agencies is accomplished through the Federal Bureau of Investigation. It is our understanding that no written instructions are given, but rather they are conveyed orally to a ranking official of the department by an Federal Bureau of Investigation Special Agent.

If I can provide any additional information, please let me know.

Sincerely,



Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

From U.S. Department of Justice 9/84

NCIC ADVISORY POLICY BOARD
INTERSTATE IDENTIFICATION INDEX SUBCOMMITTEE
WASHINGTON, D.C.
OCTOBER 16, 1984

NCIC STAFF PAPER

TOPIC #13

Federal Witness Security Program

BACKGROUND

A Witness Security Program (WSP) is operated by the Federal Government to protect certain essential witnesses in significant cases connected to organized criminal activity. The admission of witnesses into the WSP is the responsibility of the Office of Enforcement Operations (OEO) which was created in the Criminal Division of the Department of Justice in 1979. An initial application for admission to the program is submitted to OEO by the United States Attorney who documents the significance of the case to the administration of justice. The investigating agency involved assesses the threat to the witness and submits its report to OEO. The United States Marshals Service (USMS) interviews the witness to determine the individual's suitability for the program. Based on the reports submitted and other information such as prior criminal record, the OEO makes the final determination whether or not to admit a witness into the program.

Protected witnesses, their family, and close associates are often relocated to another part of the country and provided with new identities to ensure anonymity. The USMS is the agency primarily responsible for relocation and ongoing assistance to protectees in the program. Since the program began, more than 4,000 witnesses and 8,000 associate/family members have been accepted into the WSP. Approximately 300-400 new witnesses are added yearly.

DISCUSSION

A large percentage of protected witnesses (90-95%) have an arrest record prior to being accepted into the program. Although many of the witnesses' records are indexed in the Interstate Identification Index (III), new identities are added to III only when persons are arrested and fingerprinted while using the new identity. Because of this, investigators may often get a no record response when inquiring with a new identity.

Recent discussions with the OEO and USMS have resulted in plans to improve NCIC services for user agencies and also assist the USMS with administration of the WSP. The essential elements of these plans are:

o The new identities (name, Social Security number, etc.) of all persons (witnesses, associates, and family members) in the WSP will be added to III if the individual has a prior criminal record.

o The USMS will be provided with on-line notification any time a III transaction results in a record dissemination regarding a person in the WSP (notification will occur regardless of the identifiers used; i.e., true identity, new identity, FBI number, etc.) The USMS will respond accordingly to the inquirer to cooperate with a law enforcement investigation.

o An III inquiry with a new identity will provide the individuals prior record if arrest fingerprints with the new identity have been submitted to the FBI (current procedure). If there has been no arrest under the new identity, a matching inquiry with a new identity will result in a no record response to the inquirer and on-line notification to the USMS. Following receipt of this notification, the USMS will take appropriate follow-up action with the inquiring agency to provide the true identity of the individual and the individual's involvement with the WSP.

The plans set forth above are intended to provide NCIC users with records of persons who have been given new identities by the Government while maintaining sufficient anonymity for the protection of essential Government witnesses.

Prior to finalizing procedures with USMS, NCIC is making this notification to the Board; thereafter, notice will be provided to the appropriate Congressional committees.

Memo from
U.S. Department of Justice
9/84

The Witness Security Program provides for the protection, relocation and maintenance of government witnesses whose lives have been threatened by virture of their cooperation in the investigation and prosecution of individuals involved in organized criminal activity. Since its inception in 1971, the Program has proven to be an essential aid in securing otherwise unobtainable convictions against the most insidious and highest eschelons or organized crime. The Program has been closely scrutinzed by several congressional committees, the General Accounting Office and the Department of Justice. It is commonly agreed that the sensitivity of the Program and the security of the witnesses depend on limited dissemination of information relative to the operational techniques employed by the Marshals Service. This information is so closely guarded that even within the Marshals Service and Department of Justice it is disseminated to only those individuals with a compelling need to know.

It is a matter of great concern to both the Justice Department and the Marshals Service that the presently proposed language of H.R. 4249 does not specifically provide the Attorney General with the much needed authority to assure that necessary security is maintained during the procurement process of obtaining goods and services required for the secure operation of the Program. These services include, but are not limited to, the movement of household

goods, medical treatment and psychological counseling, documentation services and the renovation and construction of safesites to house protected witnesses when they appear for testimony in the danger area. A witness' household goods must be moved from one section of the country to another in such a manner as to avoid detection from the individuals against whom the witness is testifying. Consequently, it would be extremely unwise for reasons of security for the Marshals Service to contract with open-market moving companies to provide such sensitive services. Likewise, the attorneys assisting the Service in the provision of court-ordered name changes, which are central to the redocumentation process, must necessarily know both the original and new identity of the witness. Again, this is a procedure so sensitive that the information cannot be divulged to any attorney without a background clearance. Psychological evaluations and counseling of Program participants require not only the assurance of confidentiality, but also an understanding of the unique aspects attendent to the Program.

Existing Federal Acquistion Regulations (FAR) permit only two methods of procurement: Contracting by formal advertising and contracting by negotiation. Both of these methods are structured so as to allow for the broadest possible dissemination of agency requirements for the provision of services, supplies and materials through publication in the Commerce Business Daily.

Procurements of less than $25,000 may be acquired without publication in the Commerce Business Daily, but must be made on a competitive basis under the Contracting Act of 1984. There are eight statutory exemptions to the requirement for notice in the Commerce Business Daily. None of these excemptions, however, addresses the sensitive and unique issues presented by the Witness Security Program insofar as the Program is not related to matters of national defense and does not specifically deal with classified information (e.g., Confidential, Secret or Top Secret).

To correct the multitude of issues attendent to the requirements of FAR and the Contracting Act of 1984 and ensure the continued secure operation of the Witness Security Program, the Marshals Service and the Department of Justice feel it is necessary to incorparate specific exemption language into the Program's enabling legislation.

U.S. Department of Justice

United States Marshals Service

One Tysons Corner Center
McLean, Virginia 22102

January 24, 1984

Mr. David W. Beier, III
Assistant Counsel
Subcommittee on Courts, Civil
Liberties, and the Administration
of Justice
House Judiciary Committee
Washington, D. C. 20515

Dear Mr. Dave:

As I promised, here is the criteria the U.S. Marshals Service uses for screening candidates for U.S. Marshal positions.

If you have any questions, please call.

Sincerely,

Stanley E. Morris
Director

Enclosure

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, MARCH 19, 1981

AG
202-633-2007

Attorney General William French Smith today made public the procedures and qualifications guidelines that will be employed in selecting new United States Attorneys and Marshals.

"After discussions with leaders of the Senate and its Committee on the Judiciary," the Attorney General said, "I believe we have established procedures which will ensure that United States Attorneys and Marshals are chosen on the basis of merit and quality. United States Attorneys and Marshals will be selected by the President, in consultation with the members of the United States Senate.

The Attorney General also disclosed that he is continuing the policy that Assistant U.S. Attorneys will not be asked to leave because of the change in administrations.

"Criteria for retention, for those Assistant U.S. Attorneys who wish to remain, will be primarily professional qualifications, performance and character," Smith said. "New U.S. Attorneys will be informed of this policy prior to taking office."

The Attorney General outlined the procedures for the selection of U.S. Attorneys and Marshals in memoranda that were furnished to the Senate leadership on March 18. (Copies of the memoranda are attached.)

# # # #

Department of Justice

MEMORANDUM

PROCEDURES FOR SELECTION OF
U.S. ATTORNEYS AND U.S. MARSHALS

The steps to follow should be:

1. Republican Senators and other sponsors of candidates for U.S. Attorneys and U.S. Marshals are encouraged to submit three to five names for each position. In the case of U.S. Attorney candidates, the sponsors are also encouraged to have the candidates screened by a professional commission or committee.

2. The candidates' names should be submitted with resumes and biographical data to the Attorney General. The material will then be reviewed by the Associate Attorney General, and where necessary, preliminary inquiries made and interviews conducted. If problems emerge as to particular candidates, the Associate Attorney General will contact the sponsors and try to resolve the problem. If after review and consultation no candidate satisfies the criteria for the position, the Department would request additional names.

3. Once the Associate Attorney General, in consultation with the sponsors, reaches agreement on a particular candidate or candidates for a position, the Associate Attorney General will submit, through the Deputy Attorney General, a memorandum to the Attorney General setting forth the qualifications and recommendation. If the Attorney General approves the recommendation, the name or names will be submitted to the FBI for a full-field investigation and the sponsor and the White House Counsel's office immediately notified.

4. When the results of the full-field investigation are received, the Associate Attorney General will review the report. If it raises no problem, the candidate will then be interviewed by the Attorney General, the Deputy Attorney General, and the Associate Attorney General, and the Associate Attorney General's office will prepare a formal recommendation for the Attorney General to submit to the President. If the full-field investigation reveals a problem with the candidate, the Associate Attorney General will inform the sponsors and the White House. If the problem cannot be resolved, a new candidate will have to be selected.

5. The Executive Office for U.S. Attorneys will then proceed to guide the process through the White House and the Senate, and the Executive Office in the case of U.S. Attorneys and the U.S. Marshals Service in the case of U.S. Marshals will orient the candidate to his or her new responsibilities.

Qualifications Guidelines - United States Marshals

The United States Marshal is responsible for the execution of all lawful writs, processes, and orders issued pursuant to authority of the United States delivered to him for execution, making arrests, attending court, guarding and transporting prisoners, and collecting and disbursing funds incident to the operation and function of United States Courts, United States Attorneys' offices, and his own office. He is supervised in the performance of his duties by the Director of the United States Marshals Service and and also receives instructions and guidance in varying degrees from United States Attorneys, United States Judges, and the Director of the Bureau of Prisons. He is guided by the United States Marshals Manual, federal, state and local laws, court rules and procedures, departmental rules and regulations, and Civil Service Commission regulations. Further, he is responsible for accounting and personnel matters pertinent to the operation of his office.

The candidate for the position of United States Marshal should have college training, plus significant experience in the administration of justice which included or was supplemented by duties in office administration. While a maximum age is not specified, he must be a person of vitality, capable of forceful and vigorous action. He should also be someone whose reputation is such that he would be able to receive a favorable recommendation from his peers with respect to his ability and fitness.

The candidate's overall record of experience and training must reflect that he has the personal qualities and abilities commensurate with the duties and responsibilities of the position. Length of experience is of less importance than demonstrated success in positions of a responsible nature. A background of the following qualities must be reflected:

(a) Ability to deal effectively with individuals or groups representing widely diverse backgrounds, interests, and points of view.

(b) Ability to adjust work operations to meet emergency or changing program requirements.

(c) Ability to establish program objectives or performance goals and to assess progress toward their achievement.

(d) Ability to represent an organization both within and outside the organization.

(e) Ability to analyze organizational and operational problems and develop effective, timely and economical solutions.

(f) Ability to coordinate and integrate the work activities of several organizational elements.

(g) Ability to communicate with others effectively, both orally and in writing.

The following are some of the more notable roles in the administration of justice where a candidate might have gained the necessary background for appointment as United States Marshal:

(a) A practising attorney.

(b) Chief of police of a large department.

(c) County sheriff with a staff of significant size.

(d) Chief deputy or supervisory deputy United States Marshal.

(e) Warden of a correctional institution.

(f) Special Agent of the FBI or agent of the U.S. Secret Service (5 years minimum experience).

(g) Other law enforcement employment or management experience reflecting executive level policy making and decision authority.

MR. THOMAS C. GREENE, U.S. MARSHAL, NORTHERN DISTRICT OF ALABAMA

Born: January 6, 1945, Baltimore, MD.
Education: BS, University of Montevallo (1978).
Professional experience: Sergeant, Alabama Police Department (1968–1981).
Address: 1800 North 5th Avenue, Birmingham, AL
Date of appointment: October 8, 1981. Appointed by President Reagan.

MR. MELVIN E. JONES, U.S. MARSHAL, MIDDLE DISTRICT OF ALABAMA

Born: July 31, 1929, Birmingham, AL.
Education: Graduate, Tallapoosa County High School, Dadeville, AL (1948).
Professional experience: Correctional officer, Bureau of Prisons (1956–1971). Deputy U.S. marshal, District of Middle Alabama, USMS (1971 to present).
Address: P.O. Drawer 4249, Montgomery, AL.
Date of appointment: October 8, 1981. Appointed by President Reagan.

MR. HOWARD V. ADAIR, U.S. MARSHAL, SOUTHERN DISTRICT OF ALABAMA

Born: February 12, 1922, Mobile, AL.
Education: Graduate, Military Academy Secondary school, Mobile, AL. (1941).
Military experience: U.S. Army (1943–1946, 1962–1963); Alabama National guard (1939–1940, 1950–1981).
Professional experience: South Central Bell Telephone Co. (1946–1978); retired as supervisory foreman.
Address: P.O. Box 343, Mobile, AL.
Date of appointment: December 5, 1981. Appointed by President Reagan.

MR. JOHN W. ROBERTS, U.S. MARSHAL, DISTRICT OF ARIZONA

Born: December 2, 1927, Tucson, AZ.
Education: High school graduate.
Military experience: U.S. Navy (1945–1946); U.S. Army (1952).
Professional experience: Patrolman, Tucson Police Dept., Tucson, AZ (1957–1960). Deputy U.S. marshal, district of Arizona (1960–19871). Investigator, Federal Public Defender's Office, Phoenix, Az (1971–1981).
Address: 230 North First Avenue, Phoenix, AZ.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. CHARLES H. GRAY, U.S. MARSHAL, EASTERN DISTRICT OF ARKANSAS

Born: May 29, 1922, Paris, AR.
Education: BSE, University of Arkansas (1948); MS, University of Arkansas (1950).
Military experience: U.S. Marine Corps (1942–46).
Professional experience: Area manager, Wackenhut Corp., Houston, TX (1966–1970). Branch manager, Burns International Security Service, Little Rock, AR (1970–1978). U.S. marshal, Eastern District of Arkansas, Little Rock, AR (1978–present).
Address: P.O. Box 8, Little Rock, AR.
Dates of appointment: February 24, 1978—Appointed by President Carter; April 1, 1982—Reappointed by President Reagan.

MR. MACK BURTON, U.S. MARSHAL, WESTERN DISTRICT OF ARKANSAS

Born: January 7, 1928, Chismville, AR.
Education: High school graduate.
Military experience: U.S. Coast Guard (1946–1948).
Professional experience: Highway patrolman, Arkansas State Police, Ft. Smith, AR (1951–1966). Deputy and chief deputy U.S. marshal, Western District of Arkansas, Ft. Smith (1966–1977). U.S. marshal, Western district of Arkansas, Ft. Smith 1977–present).
Address: P.O. Box 1572, Ft. Smith, AR.
Date of appointment: December 1977. Appointed by President Carter.

MR. JULIO GONZALEZ, U.S. MARSHAL, CENTRAL DISTRICT OF CALIFORNIA

Born: April 28, 1917, Clifton, AZ.
Education: High school graduate.
Military experience: U.S. Air Force (1945–1946).

Professional experience: Los Angeles Police Department, retired as patrolman (1947–1967). Board member, California Youth Authority, Los Angeles, CA (1967–1976). Hearing officer, California Adult Authority, Sacramento, CA (1977–1982).
Address: 312 North Spring Street, Los Angeles, CA.
Date of appointment: July 28, 1982. Appointed by President Reagan.

MR. ARTHUR F. VAN COURT, U.S. MARSHAL, EASTERN DISTRICT OF CALIFORNIA

Born: March 12, 1926, Oakland, CA.
Education: High school graduate.
Military experience: U.S. Navy (1943–1946).
Professional experience: Los Angeles Police Department, Los Angeles, CA, retired as patrolman (1947–1967). Travel secretary and chief of security for then-Governor Ronald Reagan, Sacramento, CA (1967–1970). U.S. marshal, Eastern District of California (1970–1977). Self-employed private investigator and security consultant, Sacramento, CA (1978–1982). General manager, Le Club International, Fort Lauderdale, FL (1981–1982).
Address: 650 Capitol Mall, Sacramento, CA.
Date of appointment: September 30, 1982. Appointed by President Reagan.

MR. GLEN E. ROBINSON, U.S. MARSHAL, NORTHERN DISTRICT OF CALIFORNIA

Born: December 29, 1931, Austin, TX.
Education: AA, College of Marin, Kentfield, CA (1958).
Military experience: U.S. Air Force (1952–1957).
Professional experience: Investigator, William B. Barnes Private Investigator, San Rafael, CA (1958–1962).
Address: Department head, Survival Equipment Corp., Sausalito, CA (1959–1962). Deputy and supervisory deputy U.S. marshal, Northern District of California, San Francisco (1962–1978). U.S. marshal, Northern District of California, San Francisco, CA (1978–present).
Date of appointment: July 21, 1978. Appointed by President Carter.

MR. JAMES R. LAFFOON, U.S. MARSHAL, SOUTHERN DISTRICT OF CALIFORNIA

Born: January 26, 1915, Linton, IN.
Education: High school graduate.
Professional experience: Assemblyman and foreman, Convair Aircraft, San Diego, CA (1940–1945/1946–1947). San Diego Police Department, San Diego, retired with rank of captain (1945–1946/1947/1971). U.S. Marshal, Southern District of California, San Diego (1971–present).
Address: 940 Front Street, San Diego, CA.
Dates of appointment: June 28, 1971—Appointed by President Nixon; September 26, 1975—Appointed by President Ford; May 12, 1980—Appointed by President Carter.

CHARLES L. DUNAHUE, U.S. MARSHAL, DISTRICT OF COLORADO

Born: January 24, 1923, St. Louis, MO.
Education: High school graduate.
Military experience: U.S. Air Force (1942–1945).
Professional experience: Denver Police Department, Denver, CO; retired as detictive (1950–1975). Agent, John Gonce Realty, Denver, CO (1977–1979). Administrative officer, Office of the Auditor, City and County of Denver, CO (1979–1982).
Address: 1929 Stout Street, Denver, CO.
Date of appointment: August 19, 1982. Appointed by President Reagan.

MR. PASQUALE A. MANGINI, U.S. MARSHAL, DISTRICT OF CONNECTICUT

Born: August 3, 1926, Waterbury, CT.
Education: AA, Post College, Waterbury, CT (1947).
Military experience: U.S. Army (1945).
Professional experience: Assistant general manager, Robertshaw Controls, Inc., Waterbury, CT (1948–1981).
Address: P.O. Box 904, New Haven, CT.
Date of appointment: October 26, 1981. Appointed by President Reagan.

Mr. O. Evans Denney, U.S. Marshal, District of Delaware

Born: March 6, 1936, New Orleans, LA.
Education: AA, Delaware Technical and Community College (1976); AA, Wilmington College (1978).
Military experience: U.S. Army (1954–1956).
Professional experience: Delaware State Police, retired rank of major (1958–1977). Assistant Secretary of State, State of Delaware (1977–1981).
Address: 844 King Street, Wilmington, DE.
Date of appointment: June 30, 1981. Appointed by President Reagan.

Mr. Wallace L. McLendon, U.S. Marshal, Northern District of Florida

Born: June 29, 1940, West Palm Beach, FL.
Education: AA, Miami, Dade North Community College (1961).
Professional experience: Radio dispatcher and trooper, Florida Highway Patrol (1959–1969). Chief of police, St. Cloud, FL (1969–1972). District representative for Congressman L. A. Bafalis, Ft. Pierce, FL (1973–1981).
Address: P.O. Box 10229, Tallahassee, FL.
Date of appointment: December 10, 1981. Appointed by President Reagan.

Mr. Richard L. Cox, U.S. Marshal, Middle District of Florida

Born: October 26, 1938, Johnson City, TN.
Education: BS, U.S. Military Academy (1960); MBA, University of Tennessee (1972).
Military experience: U.S. Army, retired with the rank of Lt. Colonel (1960–1980).
Professional experience: Adjunct professor, University of South Florida and University of Tampa, Tampa, FL (1980). Project coordinator, McKay Bay Refuse to Energy Project, Tampa (1981–1982).
Address: P.O. Box 2907, Tampa, FL.
Date of appointment: March 9, 1982. Appointed by President Reagan.

Mr. Dwayne W. Gilbert, U.S. Marshal, Middle District of Georgia

Born: December 1, 1926, Griffin, GA.
Education: AA, Georgia State University, Atlanta, GA (1971).
Military experience: U.S. Marine Corps (1944–1947).
Professional experience: Trooper, Georgia State Patrol, Griffin, GA (1948–1960). Sheriff of Spalding County, Griffin, GA (1961–1978). U.S. Marshal, Middle District of Georgia, Macon (1978–Present).
Address: P.O. Box 7, Macon, GA.
Date of appointment: April 10, 1978. Appointed by President Carter.

Mr. Lynn H. Duncan, U.S. Marshal, Northern District of Georgia

Born: October 31, 1951, Carrollton, GA.
Education: BA, West Georgia College (1975).
Professional experience: Guard, Carroll County Correctional Institute (1970–1976). Agriculture sanitarian, Georgia Department of Agriculture (1976–1981).
Address: 75 Spring Street, Atlanta, GA.
Date of appointment: October 8, 1981. Appointed by President Reagan.

Mr. M. Clifton Nettles III, U.S. Marshal, Southern District of Georgia

Born: July 12, 1943, Savannah, GA.
Education: High school graduate.
Military experience: U.S. Air Force (1966–1970).
Professional experience: Nettles Refrigeration Company, Inc., Savannah, GA—currently holds the position of executive vice president (1970–1982).
Address: P.O. Box 9765, Savannah, GA.
Date of appointment: March 9, 1982. Appointed by President Reagan.

Mr. Edward M. Camacho, U.S. Marshal, District of Guam

Born: January 30, 1925, Agana, Guam.
Education: High school graduate.
Professional experience: Department of Public Safety, Agana, Guam. Retired as aide to the Director (1949–1980).
Address: 506 Pacific Daily News Building, 238 O'Hara Street, Agana, Guam.

Date of appointment: September 15, 1982. Appointed by President Reagan.

Ms. Faith P. Evans, U.S. Marshal, District of Hawaii

Born: May 11, 1937, Honolulu, HI.
Education: Graduate, St. Francis Hospital School of Nursing (1958).
Professional experience: Office Manager, Hawaii State Parent Teachers Association, Honolulu, HI (1974). Member, House of Representatives, Hawaii State Legislature, Honolulu, HI (1974–1980). Public and Community Relations Director, Habilitat, Inc., Kaneohe, HI (1982).
Address: P.O. Box 50184, Honolulu, HI.
Date of appointment: August 6, 1982. Appointed by President Reagan.

Mr. Blaine Skinner, U.S. Marshal, District of Idaho

Born: July 29, 1932, Beaford, WY.
Education: High school graduate.
Military experience: U.S. Air Force (1951–1955).
Professional experience: Sheriff, Bonneville County, ID (1970–1981). Owner/Manager, Sunset Trailer Park, Idaho Falls, ID (1978–1981). Correctional Officer, Idaho State Department of Corrections (1981).
Address: 550 West Fort Street, Boise, ID.
Date of appointment: November 12, 1981. Appointed by President Reagan.

Mr. James L. Fyke, U.S. Marshal, Central District of Illinois

Born: June 14, 1936 Marion County. IL.
Education: BS, Law Enforcement Administration, with high honor, Michigan State University (1963). Graduate Study in Public Administration and Security Administration, University of Missouri at Kansas City, Michigan State University, and Kent State University (1966–1971).
Professional experience: Director and research associate, Bureau of Government Research and Service, Kent State University (1969–1971, Joint Appointment). Director of Security, Kent State University (1971–1973). Director, Regional Police Training Center Illinois Central College, East Peoria, IL (1973–1974, Joint Appointment).
Associate professor of Police Science, Illinois Central College, East Peoria, IL (summer 1973–1982).
Address: P.O. Box 156, Springfield, IL
Date of appointment: April 22, 1982. Appointed by President Reagan.

Mr. Peter J. Wilkes, U.S. Marshal, Northern District of Illinois

Born: March 2, 1942, Chicago, IL.
Education: High school graduate.
Professional experience: Driver's examiner and investigator, Illinois Secretary of State, Chicago (1960–1965). Trooper, Illinois State Police, Springfield (1965–1977). Legal investigator, Dan Walker Law Office, Oak Brook, IL (1977–1978). Administrative assistant to Comptroller, State of Illinois, Chicago (1978–1979). U.S. marshal, Northern District of Illinois, Chicago (1979–Present).
Address: 219 South Dearborn Street, Chicago, IL.
Date of appointment: June 21, 1979, Appointed by President Carter.

Mr. William J. Nettles, U.S. Marshal, Southern District of Illinois

Born: March 29, 1929, Carlyle, IL.
Education: High school graduate.
Military experience: U.S. Army (1950–1953).
Professional experience: Chief deputy sheriff, Clinton County, IL (1957–1962). Sheriff, Clinton County, IL (1962–1966). Treasurer, Clinton County, IL (1966–1969). Executive assistant to the Attorney General of the State of Illinois, Springfield, IL (1969–1982).
Address: 750 Missouri Avenue, East St. Louis, IL.
Date of appointment: March 9, 1982. Appointed by President Reagan.

Mr. J. Jerome Perkins, U.S. Marshal, Northern District of Indiana

Born: May 30, 1929, St. Louis, MO.
Education: Graduate, Central High School, South Bend, IN (1947).

Professional experience: Indiana Police Department, retired as chief of detectives (1952–1972). Security supervisor, South Bend Community School Corp. IN (1972–1981).
Address: P.O. Box 477, South Bend, IN.
Date of appointment: November 18, 1981. Appointed by President Reagan.

MR. RALPH D. MORGAN, U.S. MARSHAL, SOUTHERN DISTRICT OF INDIANA

Born: August 18, 1931, Washingtin, IN.
Education: Graduate, Washington High School (1949).
Military experience: U.S. Air Force (1951–1955).
Professional experience: Sheriff, Daviess County, IN (1963–1971). Deputy U.S. marshal, Southern District of Indiana (1971–1981).
Address: P.O. Box 44803, Indianapolis, IN.
Date of appointment: October 8, 1981. Appointed by President Reagan.

MR. JAMES P. JONKER, U.S. MARSHAL, NORTHERN DISTRICT OF IOWA

Born: January 19, 1926, Pella, IA.
Education: High school graduate.
Military experience: U.S. Army (1951).
Professional experience: Iowa State Patrol, Spencer, IA, retired as post commander (1957–1981).
Address: P.O. Box 4740, Cedar Rapids, IA.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. WARREN D. STUMP, U.S. MARSHAL, SOUTHERN DISTRICT OF IOWA

Born: January 29, 1927, Fort Dodge, IA.
Education: Graduate, Fort Dodge High School.
Military experience: U.S. Army (1945–1946), Military Police.
Professional experience: Deputy sheriff, Polk County Sheriff's Office, IA (1954–1956). Special agent in charge, Administration and Identification, Iowa Division, of Criminal Investigation, Des Moines, IA (1957–1981).
Address: East First & Walnut Streets, Des Moines, IA.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. KENNETH L. PEKAREK, U.S. MARSHAL, DISTRICT OF KANSAS

Born: April 4, 1949, Hays, KS.
Education: BS, Central Missouri State College (1971).
Professional experience: Deputy U.S. marshal, Southern District of Florida (1972–1977).
Address: 444 Southeast Quincy, Topeka, KS.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. CHARLES PENNINGTON, JR., U.S. MARSHAL, EASTERN DISTRICT OF KENTUCKY

Born: September 16, 1939, Corbin, KY.
Education: Graduate, London High School, London, KY (1948).
Military experience: U.S. Army (1955–1957).
Professional experience: Deputy U.S. marshal, Eastern District of Kentucky (1960–1981).
Address: P.O. Box 30, Lexington, KY.
Date of appointment: November 12, 1981. Appointed by President Reagan.

MR. RALPH L. BOLING, U.S. MARSHAL, WESTERN DISTRICT OF KENTUCKY

Born: August 18, 1928, Hawesville, KY.
Education: Graduate, Beechmont High School, Hawesville, KY.
Military experience: U.S. Army (1946–1947).
Professional experience: Sheriff, Hancock County, KY (1970–1974). Driller/Machine Operator, Ingle Oil Co., Hawesville, KY (1974–1978). Sheriff, Hancock County, KY (1978–1981).
Address: 600 West Broadway, Louisville, KY.
Date of appointment: October 26, 1981. Appointed by President Reagan.

MR. JAMES V. SERIO, JR., U.S. MARSHAL, EASTERN DISTRICT OF LOUISIANA

Born: June 19, 1932, New Orleans, LA.

Education: High school graduate.
Professional experience: Director, State Department of Vocational Rehabilitation, Algiers, LA (1966–1969). Secretary to Board, City of New Orleans, (1970–1972). Field representative to U.S. Senator J. Bennett Johnston, New Orleans (1972–1978). U.S. marshal, Eastern District of Louisiana, New Orleans (1978–Present).
Address: 500 Camp Street, New Orleans, LA.
Date of appointment: March 1978. Appointed by President Carter.

MR. BRIAN P. JOFFRION, U.S. MARSHAL, WESTERN DISTRICT OF LOUISIANA

Born: December 8, 1947 Donaldsonville, LA.
Education: JD, Loyola University School of Law (1974); BA, Louisiana State University (1969).
Professional experience: Law clerk, Hon. James A. Comiskey, U.S. District Court, Eastern District of Louisiana, New Orleans, (1973–1974). Law clerk, Hon. Tom Staff, U.S. District Court, Western District of Louisiana, Shreveport (1974–1975). Assistant U.S. attorney, Western District of Louisiana, Shreveport (1976–1980). U.S. marshal, Western District of Louisiana, Shreveport (1980–Present).
Address: P.O. Box 53, Shreveport, LA.
Date of appointment: September 24, 1980. Appointed by President Carter.

MR. JAMES L. MEYERS, U.S. MARSHAL, MIDDLE DISTRICT OF LOUISIANA

Born: August 21, 1934, Baton Rouge, LA.
Education: BA, St. Mary's College (1959).
Professional experience: Inspector, U.S. Border Patrol, Comstock, TX (1960–1963). Special agent, Naval Investigative Service, New Orleans, LA (1963–1967). Deputy U.S. marshal, Eastern and Middle Districts of Louisiana (1967–1979). Court-appointed U.S. marshal, Middle District of Louisiana (1979–1981).
Address: P.O. Box 3653, Baton Rouge, LA.
Date of appointment: December 5, 1981. Appointed by President Reagan.

MR. EMERY R. JORDAN, U.S. MARSHAL, DISTRICT OF MAINE

Born: August 20, 1927, Lewiston, MA.
Education: BS, University of Maine (1978).
Military experience: U.S. Navy (1945–1946, 1951–1952).
Professional experience: Maine State Police, retired rank of captain (1952–1972). Associate professor, Bangor Community College (1972–1981).
Address: P.O. Box 349, Portland, MA.
Date of appointment: October 2, 1981. Appointed by President Reagan.

MR. JOHN W. SPURRIER, U.S. MARSHAL, DISTRICT OF MARYLAND

Born: November 26, 1920, Baltimore, MD.
Education: BS, Loyola College (1949).
Military experience: U.S. Army (1942–1946).
Professional experience: Junior engineer, Baltimore Transit Co., Baltimore, MD (1949–1952). Statistical assistant, Office of the Comptroller, Ft. George G. Meade, MD (1952–1955). Chief deputy United States marshal, District of Maryland, Baltimore (1955–1973). Court-appointed U.S. marshal, District of Maryland, Baltimore (1973–1974). U.S. marshal, District of Maryland, Baltimore (1974–present).
Address: 101 West Lombard Street, Baltimore, MD.
Dates of appointment: February 28, 1974—Appointed by President Nixon; May 10, 1980—Appointed by President Carter.

MR. ANTHONY BERTONI, U.S. MARSHAL, EASTERN DISTRICT OF MICHIGAN

Born: October 18, 1919, Warren, MI.
Education: High school graduate.
Military experience: U.S. Navy (1944–1946).
Professional experience: Detroit Police Department, Detroit MI, promoted through ranks to superintendent (1947–1975). Supervisor of purchasing, Olsonite Corp., Detroit, MI (1975–1978). U.S. marshal, Eastern District of Michigan (1978 to present).
Address: 231 West Lafayette Street, Detroit, MI.
Dates of appointment: July 21, 1978—Appointed by President Carter; December 10, 1982—Appointed by President Reagan.

MR. JOHN R. KENDALL, U.S. MARSHAL, WESTERN DISTRICT OF MICHIGAN

Born: March 6, 1943, Windsor, ON.
Education: BS, Wayne State University (1972); MPA, Wayne State University (1977).
Military experience: U.S. Air Force (1962–1966).
Professional experience: Grosse Pointe Park Police (1966–1974). Chief of police, Harbor Springs Police Dept., MI (1975–1979). Undersheriff, Grand Traverse County Sheriff's Department, MI (1979–1981).
Address: 110 Michigan Avenue, NW, Grand Rapids, MI.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. ROBERT L. PAVLAK, SR., U.S. MARSHAL, DISTRICT OF MINNESOTA

Born: July 18, 1924, St. Paul, MN.
Education: High school graduate.
Military experience: U.S. Marine Corps (1942–1945).
Professional experience: Lieutenant, St. Paul Police Department, MN (1949–1981).
Address: 110 South 4th Street, Minneapolis, MN.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. DWIGHT G. WILLIAMS, U.S. MARSHAL, NORTHERN DISTRICT OF MISSISSIPPI

Born: December 14, 1932, Ingomar, MS.
Education: High school graduate.
Military experience: U.S. Air Force (1953–1957).
Professional experience: Manager, Cities Service Oil Co., New Albany (1957–1964). Part-time deputy sheriff, Union County, MS (1960–1963). Deputy U.S. marshal, Northern District of Mississippi (1964–1982).
Address: P.O. Box 887, Oxford, MS.
Date of appointment: December 10, 1982. Appointed by President Reagan.

MR. MARVIN E. BREAZEALE, U.S. MARSHAL, SOUTHERN DISTRICT OF MISSISSIPPI

Born: September 18, 1938, Purvis, MS.
Education: BS, University of Southern Mississippi, (1972).
Professional experience: Gulf Oil Corp., Purvis, MS (1966–1974). Sales agent, Farm Bureau Insurance Co., Purvis, MS (1975–1976). Sheriff, Lamor County, MS (1976–1982).
Address: P.O. Box 959, Jackson, MS.
Date of appointment: May 13, 1982. Appointed by President Reagan.

MR. WILLIAM S. VAUGHN, U.S. MARSHAL, EASTERN DISTRICT OF MISSOURI

Born: February 19, 1930, St. Louis, MO.
Education: BA, University of Missouri (1973); MA, Webster College (1975); MBA, Southern Illinois University (1976).
Professional experience: Precinct commander (captain), St. Louis County Police Dept., MO (1955–1981).
Address: 1114 Market Street, St. Louis, MO.
Date of appointment: December 5, 1981. Appointed by President Reagan.

MR. LEE KOURY, U.S. MARSHAL, WESTERN DISTRICT OF MISSOURI

Born: August 31, 1932, Los Angeles, CA.
Education: High school graduate.
Military experience: U.S. Army (1952–1954).
Professional experience: Los Angeles Sheriff's Department, CA, retired as detective sergeant (1955–1978). Owner/operator, Metropolitan Detective Bureau, Columbia, MO (1978–1981). Law enforcement instructor, Institute of Public Safety, University of Missouri (1979–1981).
Address: 811 Grand Avenue, Kansas City, MO.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. THOMAS A. O'HARA, JR., U.S. MARSHAL, DISTRICT OF NEBRASKA

Born: December 28, 1933, Costesville, PA.
Education: BA, Notre Dame University (1955); MA, University of Nebraska (1975).
Military experience: U.S. Air Force, retired with rank of colonel (1955–1979).

Professional experience: Real estate agent, C.G. Smith Realty, Bellevue, NE (1975–1976). Vice-president and co-owner, Nebraskans, Inc., Bellevue, NE (1976–1981). Associate broker, Bellevue Real Estate, Bellevue, NE (1981–1982).
Address: P.O. Box 1477, Omaha, NE.
Date of appointment: February 22, 1982. Appointed by President Reagan.

MR. DENNY L. SAMPSON, U.S. MARSHAL, DISTRICT OF NEVADA

Born: March 2, 1930, Twin Falls, ID.
Education: AA, Santa Ana College (1952).
Military experience: U.S. Army (1948–1949).
Professional experience: Deputy U.S. marshal, District of Nevada (1954–1969). U.S. marshal, District of Nevada (1969–1977). Deputy U.S. marshal/chief deputy U.S. marshal/enforcement specialist, district of Nevada (1977–1981).
Address: P.O. Box 16039, Las Vegas, NV.
Date of appointment: November 18, 1981. Appointed by President Reagan.

MR. RONALD D. DANIELS, JR., U.S. MARSHAL, DISTRICT OF NEW HAMPSHIRE

Born: June 16, 1937, Concord, NH.
Education: High school graduate.
Professional experience: Part-time employee, Hopkinton Police Dept., Hopkinton, NH (1957–1963). Chief, Hopkinton Police Dept. (1963–1969). Chief, deputy sheriff, Merrimack County, NH (1969–1971). Sheriff, Merrimack County, NH (1971–1982).
Address: P.O. Box 14325, Concord, NH.
Date of appointment: December 1, 1981. Appointed by President Reagan.

MR. EUGENE G. LISS, U.S. MARSHAL, DISTRICT OF NEW JERSEY

Born: December 30, 1938, Newark, NJ.
Education: BA, Seton Hall University (1961); JD, Seton Hall University Law School (1969).
Professional experience: Teacher, Newark Board of Education, Newark, NJ (1964–1971). Attorney and law partner, Pinebrook and Little Falls, NJ (1974–1982).
Address: P.O. Box 186, Newark, NJ.
Date of appointment: March 9, 1982. Appointed by President Reagan.

MR. RUDOLPH G. MILLER, U.S. MARSHAL, DISTRICT OF NEW MEXICO

Born: November 27, 1927, Albuquerque, NM.
Education: High school graduate.
Military experience: U.S. Navy (1945).
Professional experience: Santa Fe Police Department, Santa Fe, NM, resigned with rank of captain (1951–1971). Deputy U.S. marshal, District of New Mexico (1971–1974). Chief of police, Santa Fe Police Department, retired (1974–1979).
Address: P.O. Box 444, Albuquierque, NM.
Date of appointment: March 9, 1982. Appointed by President Reagan.

MR. FRANCIS K. PEO, U.S. MARSHAL, NORTHERN DISTRICT OF NEW YORK

Born: May 27, 1932, Watertown, NY.
Education: High school graduate.
Military experience: U.S. Army (1949–1952).
Professional experience: New York State Police (1953–1982), currently senior investigator in charge of Organized Crime Task Force Unit, Utica, NY.
Address: 10 Broad Street, Utica, NY.
Date of appointment: July 28, 1982. Appointed by President Reagan.

MR. CHARLES E. HEALEY, U.S. MARSHAL, EASTERN DISTRICT OF NEW YORK

Born: September 10, 1932, Brooklyn, NY.
Education: High school graduate.
Military experience: U.S. Marine Corps (1952–1955).
Professional experience: New York City Police Department, promoted to rank of detective (1957–1982).
Address: 225 Cadman Plaza East, Brooklyn, NY.
Date of appointment: December 10, 1982. Appointed by President Reagan.

MR. ROMOLO J. IMUNDI, U.S. MARSHAL, SOUTHERN DISTRICT OF NEW YORK

Born: August 18, 1918, Queens, NY.
Education: Cornell Labor College, Collective Bargaining and Labor Relations (1971–1973).
Military experience: U.S. Air Force (1943–1945).
Professional experience: New York City Police Department, retired as detective first grade (1942–1974). Investigator, Veterans Administration. New York, NY (1974–1982).
Address: 1 St. Andrews Plaza, New York, NY.
Date of appointment: December 10, 1982. Appointed by President Reagan.

MR. DANIEL B. WRIGHT, U.S. MARSHAL, WESTERN DISTRICT OF NEW YORK

Born: June 1, 1939, Spencerport, NY.
Education: AA, Monroe Community College (1976).
Military experience: U.S. Army (1956–1959).
Professional experience: Monroe County Sheriff's Office, Rochester, NY; promoted to rank of lieutenant (1962–1982). Owner, Wright Auto Sales, Rochester, NY (1971–1978). Instructor, Board of Cooperative Education Service, Spencerport, NY (1978–1981).
Address: 68 Court Street, Buffalo, NY.
Date of appointment: December 10, 1982. Appointed by President Reagan.

MR. WILLIAM I. BERRYHILL, JR., U.S. MARSHAL, EASTERN DISTRICT OF NORTH CAROLINA

Born: April 19, 1941, Raleigh, NC.
Education: BA, University of North Carolina (1963).
Professional experience: Secretary and assistant treasurer, Bowers Construction Co., Raleigh, NC (1968–1974). Director, North Carolina Congressional Club, Raleigh, NC (1974–1975). Staff assistant, Office of Senator Jesse Helms (1975–1981).
Address: P.O. Box 25640, Raleigh, NC.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. GEORGE L. MCBANE, U.S. MARSHAL, MIDDLE DISTRICT OF NORTH CAROLINA

Born: September 5, 1930, Roxboro, NC.
Education: High school graduate.
Military experience: U.S. Army (1951–1953).
Professional experience: Draftsman, Western Electric, Burlington, NC (1953–1976). Senior sales representative, TRW, Rogers, AR (1977). Production planner and manufacturing engineer, Crompton & Knowles Corp., Burlington, NC (1978–1981).
Address: P.O. Box 1528, Greensboro, NC.
Date of appointment: February 9, 1982. Appointed by President Reagan.

MR. MAX E. WILSON, U.S. MARSHAL, WESTERN DISTRICT OF NORTH CAROLINA

Born: January 15, 1929, Pensacola, NC.
Education: High school graduate.
Military experience: North Carolina Army National Guard (1948–1956).
Professional experience: Intermittent deputy U.S. marshal, Western District of North Carolina, Asheville, NC (1970–1974). U.S. marshal, Western District of North Carolina, Asheville, NC (1974–1977). Owner/manager, Wilson Mobile Home Repairs, Inc., Asheville, NC (1978–1982). Owner, manager, Country Mobile Home Park, Fairview, NC (1979–1982). Court-appointed U.S. marshal, Western District of North Carolina (1981–1982).
Address: P.O. Box 59, Asheville, NC.
Date of appointment: September 15, 1982. Appointed by President Reagan.

MR. KENNETH B. MUIR, U.S. MARSHAL, DISTRICT OF NORTH DAKOTA

Born: March 19, 1929, Fordville, ND.
Education: Graduate, Fargo Central High School, Fargo, ND.
Professional experience: Patrolman, Fargo Police Dept., Fargo, ND (1950–1959). Deputy U.S. marshal, District of North Dakota (1959–1981).
Address: P.O. Box 2425, Fargo, ND.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. EARL L. RIFE, U.S. MARSHAL, NORTHERN DISTRICT OF OHIO

Born: November 14, 1919, Luckey, OH.
Education: High school graduate.
Military experience: U.S. Army Air Corps (1942–1945).
Professional experience: Sheriff, Wood County, Bowling Green, OH (1961–1973). Director, Juvenile Court, Bowling Green, OH (1973–1976). Clerk of Court, Court of Common Pleas, Wood County, Bowling Green, OH (1977–1981).
Address: 210 Superior Avenue, Cleveland, OH.
Date of appointment: April 1, 1982. Appointed by President Reagan.

MR. ROBERT W. FOSTER, U.S. MARSHAL, SOUTHERN DISTRICT OF OHIO

Born: May 27, 1930, Columbus, OH.
Education: BS, Ohio State University (1955).
Military experience: U.S. Army (1948–1950); U.S. Air Force (1951–1952).
Professional experience: Special agent, U.S. Secret Service (1956–1978). Assistant director, State of Ohio, Department of Administrative Services, Office of Manpower Development (1979–1980). Security consultant, Bank One, Columbus, OH (1980–1981).
Address: P.O. Box 688, Cincinnati, OH.
Date of appointment: October 26, 1981. Appointed by President Reagan.

MR. LAURENCE C. BEARD, U.S. MARSHAL, EASTERN DISTRICT OF OKLAHOMA

Born: August 9, 1913, Sapulpa, OK.
Education: Technical Training Certificate, Oklahoma State University (1947).
Military experience: U.S. Army (1941–1945).
Professional experience: U.S. marshal, Eastern District of Oklahoma (1970–1977). Owner/operator, Beard Refrigeration and Air Conditioning (1977–1981).
Address: P.O. Box 738, Muskogee, OK.
Date of appointment: October 29, 1981. Appointed by President Reagan.

MR. HARRY CONNOLLY, U.S. MARSHAL, NORTHERN DISTRICT OF OKLAHOMA

Born: July 9, 1929, Raymondville, MO.
Education: High school graduate.
Military experience: U.S. Army (1951–1953), Military Police.
Professional experience: Deputy U.S. marshal/chief deputy U.S. marshal, Northern District of Oklahoma (1956–1969). U.S. marshal, Northern District of Oklahoma (1969–1977). Deputy U.S. marshal, Northern District of Oklahoma (1977–1981).
Address: P.O. Box 1097, Tulsa, OK.
Date of appointment: December 5, 1981. Appointed by President Reagan.

MR. STUART E. EARNEST, U.S. MARSHAL, WESTERN DISTRICT OF OKLAHOMA

Born: February 20, 1939, Wewoka, OK.
Education: High school graduate.
Professional experience: Police officer, The Village Police Department, The Village, OK (1960–1970). Deputy U.S. marshal, Western District of Oklahoma (1970–1982).
Address: P.O. Box 886, Oklahoma City, OK.
Date of appointment: February 9, 1982. Appointed by President Reagan.

MR. KERNAN H. BAGLEY, U.S. MARSHAL, DISTRICT OF OREGON

Born: August 24, 1936, Portland, OR.
Education: Graduate, West Linn High School, OR.
Professional experience: Deputy U.S. marshal, District of Oregon (1965–1981). U.S. marshal, court-appointed, District of Oregon (1981).
Address: 620 Southwest Main Street, Portland, OR.
Date of appointment: November 12, 1981. Appointed by President Reagan.

MR. MATTHEW CHABAL, JR., U.S. MARSHAL, MIDDLE DISTRICT OF PENNSYLVANIA

Born: August 5, 1927, Scranton, PA.
Education: High school graduate.
Military experience: U.S. Navy (1945–1946).
Professional experience: Pennsylvania State Police, retired rank of sergeant (1949–1977). Owner/operator, Self-Service Car Wash (1977–1982).

Address: P.O. Box 310, Scranton, PA.
Date of appointment: December 10, 1982. Appointed by President Reagan.

MR. EDWARD D. SCHAEFFER, U.S. MARSHAL, EASTERN DISTRICT OF PENNSYLVANIA

Born: August 1, 1928, Philadelphia, PA.
Education: High school graduate.
Professional experience: Investigator, Globe Detective Agency, Philadelphia, PA (1952–1956). Probation officer and investigator, City of Philadelphia Probation Department (1958–1966). Investigator, Pinkerton's Inc., Philadelphia (1967). Deputy U.S. marshal, Eastern District of Pennsylvania, Philadelphia (1968–1977). U.S. marshal, Eastern District of Pennsylvania, Philadelphia (1977–Present).
Address: 601 Market Street, Philadelphia, PA.
Date of appointment: October 1977. Appointed by President Carter.

MR. EUGENE V. MARZULLO, U.S. MARSHAL, WESTERN DISTRICT OF PENNSYLVANIA

Born: March 5, 1936, New Kensington, PA.
Education: High school graduate.
Professional experience: Patrolman, Fairfax County Police Department, Fairfax, VA (1967–1970). Deputy U.S marshal, District of Columbia, and Western District of Pennsylvania (1970–1982).
Address: 7th & Grant Streets, Pittsburgh, PA.
Date of appointment: July 28, 1982. Appointed by President Reagan.

MR. JOSÉ A. LOPEZ, U.S. MARSHAL, DISTRICT OF PUERTO RICO

Born: September 29, 1940, Santurce, PR.
Education: BA, University of Puerto Rico (1964).
Professional experience: Deputy U.S. marshal, District of Puerto Rico, San Juan (1965–1970). U.S. marshal, District of Puerto Rico, San Juan (1970–Present).
Address: P.O. Box 3748, San Juan, PR.
Dates of appointment: August 13, 1970, appointed by President Nixon; December 18, 1974, appointed by President Ford; August 2, 1979, appointed by President Carter.

MR. DONALD W. WYATT, U.S. MARSHAL, DISTRICT OF RHODE ISLAND

Born: April 15, 1929, Providence, RI.
Education: High school graduate.
Professional experience: Advertising, Public Relations, self-employed, Don Wyatt Enterprises, Warwick, RI (1970–1971). U.S. marshal, District of Rhode Island (1971–1980). Staff assistant, Office of Senator John Chafee, RI (1980–1981).
Address: P.O. Box 1524, Providence, RI.
Date of appointment: December 17, 1981. Appointed by President Reagan.

MR. WILLIAM C. WHITWORTH, U.S. MARSHAL, DISTRICT OF SOUTH CAROLINA

Born: July 31, 1931, Columbia, SC.
Education: High school graduate.
Military experience: U.S. Marine Corps (1950–1954).
Professional experience: Deputy U.S. marshal and chief deputy U.S. marshal, District of Columbia and District of South Carolina (1963–1981); also served as Special Operations group commander. Court-appointed U.S. marshal, District of South Carolina (1981–1982).
Address: P.O. Box 1774, Columbia, SC.
Date of appointment: June 21, 1982. Appointed by President Reagan.

MR. GENE G. ABDALLAH, U.S. MARSHAL, DISTRICT OF SOUTH DAKOTA

Born: July 16, 1936, Sioux Falls, SD.
Education: High school graduate.
Professional experience: Minnehaha County Sheriff's Department, Sioux Falls, SD. Held various positions as jailer, deputy sheriff and chief deputy sheriff (1963–1968). Salesman, Billion Motors, Sioux Falls, SD (1968–1969). Salesman and sales promotion manager, Sodak Distributing Co., Sioux Falls, SD (1969–1982). Chief special deputy sheriff, Minnehaha County, Sioux Falls, SD (1974–1982).
Address: P.O. Box 1193, Sioux Falls, SD.
Date of appointment: March 9, 1982. Appointed by President Reagan.

Mr. Burce R. Montgomery, U.S. Marshal, Eastern district of Tennessee

Born: December 15, 1933, Gatlinburg, TN.
Education: High school graduate.
Professional experience: Justice of the peace, Sevier County, TN (1960–1966) (intermittent appointment). Deputy sheriff, Sevier County, TN (1966–1968) (intermittent appointment). Deputy U.S. marshal, Eastern and Western Districts of Tennessee (1970–1976) (1977–1981). U.S. marshal, Eastern District of Tennessee (1976–1977).
Address: P.O. Box 551, Knoxville, TN.
Date of appointment: December 17, 1981. Appointed by President Reagan.

Mr. William J. Evins, Jr., U.S. Marshal, Middle District of Tennessee

Born: July 27, 1929, Lebanon, TN.
Education: High school graduate.
Professional experience: Musician, Nashville, TN (1953–1955/1958–1959). Deputy sheriff, Dekalb County, TN (1955–1958). Owner and manager of Outboard Service, Smithville, TN (1959–1961). Deputy U.S. marshal, Middle District of Tennessee, Nashville (1961–1977). U.S. marshal, Middle district of Tennessee, Nashville (1977–Present).
Address: 801 Broadway, Nashville, TN.
Date of appointment: September 1977. Appointed by President Carter.

Mr. John T. Callery, U.S. Marshal, Western District of Tennessee

Born: October 18, 1940, Brownsville, TN.
Education: High School Graduate
Military experience: U.S. Army (1961–1964)
Professional experience: Self-employed, Tom Callery Insurance Agency, Brownsville, TN (1969–1970). Field representative, Office of Senator William Brock, Brownsville, TN (1970–1977). Salesman, Duke Forest Products, Cardova, TN (1977–1978). District manager, Delta Quip, Inc., Memphis, TN (1978–1980). Salesman, Brick Mill Studios, Wilton, NH (1980–1981). Salesman, Metropolitan Life Insurance co. Jackson, TN (1980–1982).
Address: 167 North Main Street, Memphis, TN.
Date of appointment: April 22, 1982. Appointed by President Reagan.

Mr. James G. Barton, U.S. Marshal, Eastern District of Texas

Born: January 20, 1933, Henderson, TX.
Education: High school graduate.
Military experience: U.S. Air Force (1953–1954).
Professional experience: Patrolman, Texas Highway Patrol, Terrell and Henderson, TN (1955–1962). Deputy, supervisory deputy, and chief deputy U.S. marshal, Eastern District of Texas, Beaumont, TX (1962–1977). U.S. marshal, Eastern district of Texas (1977–1982).
Address: P.O. Box 111, Beaumont, TX.
Date of appointment: June 17, 1977. Appointed by President Carter.

Mr. Clinton T. Peoples, U.S. Marshal, Northern District of Texas

Born: August 25, 1910, Bridgeport, TX.
Education: High school graduate.
Professional experience: Deputy sheriff and chief deputy sheriff, Montgomery County, TX (1930–1941). Highway patrolman, Department of Public Safety, Austin, TX (1941–1942 and 1945–1946). Superior Oil and Sun Oil Co. employee, Conroe, TX (1943–1945). Captain and senior range captain, Texas Rangers, Austin and Waco (1946–1974). U.S. marshal, Northern District of Texas, Dallas (1974 to present).
Address: 1100 Commerce Street, Dallas, TX.
Dates of appointment: April 26, 1974, appointed by President Nixon; July,21, 1978, appointed by President Carter; August 18, 1982, appointed by President Reagan.

Mr. Basil S. Baker, U.S. Marshal, Southern District of Texas

Born: November 13, 1926, Houston, TX.
Education: High school graduate.
Military experience: U.S. Navy (1944–1946).
Professional experience: Houston Police Department, retired as lieutenant (1950–1970). Vice president, Monterey House, Inc. Houston, TX, retired (1970–1981).

Address: P.O. Box 61608, Houston, TX.
Date of appointment: March 9, 1982. Appointed by President Reagan.

MR. WILLIAM J. JONAS, JR., U.S. MARSHAL, WESTERN DISTRICT OF TEXAS

Born: November 11, 1936, Kerrville, TX.
Education: BA, Texas A & M University (1960).
Military experience: U.S. Army (1960).
Professional experience: Special agent, Federal Bureau of Investigation, Alabama and Indiana (1962–1965). Security supervisor, Southwestern Bell Telephone Co., San Antonio, TX (1965–1980). Self-employed—security consultant; vice-president and general manager, Security Planners and Development Co., San Antonio, TX (1980–1982).
Address: 655 East Durango Street, San Antonio, TX.
Date of appointment: February 9, 1982. Appointed by President Reagan.

MR. EUGENE H. DAVIS, U.S. MARSHAL, DISTRICT OF UTAH

Born: October 16, 1928, Independence, MO.
Education: BS, Brigham Young University (1952); LLB, University of Utah (1958).
Military experience: U.S. Army (1952–1954).
Professional experience: Special Agent, Federal Bureau of Investigation, Los Angeles, CA (1960–1962). Associate attorney, Law Firm of Romney, Nelson & Cassidy, Salt Lake City, UT (1965–1975). House legal counsel, Ideal National Insurance Co., Salt Lake City, UT (1975–1977). Legal counsel, Intervest Commodities, Inc., Salt Lake City, UT (1977–1980). Private law practice, Salt Lake City, UT (1980–1982).
Address: P.O. Box 1234, Salt Lake City, UT.
Date of appointment: February 9, 1982. Appointed by President Reagan.

MR. CHRISTIAN HANSEN, JR., U.S. MARSHAL, DISTRICT OF VERMONT

Born: October 16, 1931, Fitchburg, MA.
Education: High school graduate.
Military experience: U.S. Air Force (1951–1955).
Professional experience: U.S marshal, District of Vermont (1969–1977). Owner/operator, Avenue Grocery Store, Brattleboro, VT (1977–1982).
Address: P.O. Box 946, Burlington, VT.
Date of appointment: March 17, 1982. Appointed by President Reagan.

MR. HERBERT RUTHERFORD III, U.S. MARSHAL, EASTERN DISTRICT OF VIRGINIA

Born: June 14, 1948, Washington, DC.
Education: High school graduate.
Military experience: U.S. Army (1967–1970).
Professional experience: Deputy U.S. marshal, District of Columbia, Washington, DC (1971–1978). Inspector, U.S. Marshals Service, Fourth Judicial Circuit, Richmond, VA (1978–1980). Chief deputy U.S. marshal, Northern District of Ohio and District of New Jersey (1980–1982).
Address: Room 335, 600 Granby Street, Norfolk, VA.
Date of appointment: September 15, 1982. Appointed by President Reagan.

MR. WAYNE D. BEAMAN, U.S. MARSHAL, WESTERN DISTRICT OF VIRGINIA

Born: September 16, 1947, Harrisonburg, VA.
Education: AAS, Blue Ridge Community College (1979).
Military experience: U.S. Marine Corps (1967–1970).
Professional experience: Trooper, Virginia State Police (1970–1972). Loan officer trainee, Rockingham National Bank, Harrisonburg, VA (1972–1974). Lieutenant, Rockingham County Sheriff's Department, VA (1974–1981).
Address: P.O. Box 2280, Roanoke, VA.
Date of appointment: December 10, 1981. Appointed by President Reagan.

MR. MELVIN CARTER, U.S. MARSHAL, DISTRICT OF THE VIRGIN ISLANDS

Born: February 1, 1943, Amherst, VA.
Education: High school graduate.
Military experience: U.S. Army (1961).

Professional experience: Baltimore County Police Department (1962–1971). Deputy U.S. marshal (1971–1977). Witness security inspector (1977–1979). Supervisory witness security inspector (1979–1981). Chief deputy U.S. marshal (1981–1982).
Address: P.O. Box 720, St. Thomas, VI.
Date of appointment: May 30, 1982. Appointed by Attorney General Smith.

MR. PAUL R. NOLAN, U.S. MARSHAL, EASTERN DISTRICT OF WASHINGTON

Born: June 11, 1927, Spokane, WA.
Education: High school graduate.
Military experience: U.S. Navy (1945–1946).
Professional experience: Deputy sheriff, Spokane County Sheriff's Office, WA (1953–1954). Spokane Fire Department, retired as director, Arson Investigation Bureau (1954–1981). Owner/operator, Fire Investigation Service, Spokane, WA (1979–1981).
Address: P.O. Box 1463, Spokane, WA.
Date of appointment: December 5, 1981. Appointed by President Reagan.

MR. JOSEPH J. HARVEY, U.S. MARSHAL, WESTERN DISTRICT OF WASHINGTON

Born: June 11, 1922, Darrington, WA.
Education: High school graduate.
Military experience: U.S. Navy (1942–1946).
Professional experience: Chief of police, Marysville, WA (1946–1947). Washington State Patrol, Olympia (1947–1974); retired with rank of major. Sheriff of Snohomish County, Everett, WA (1974–1977). U.S. marshal, Western District of Washington, Seattle (1977–Present).
Address: 1010 5th Avenue, Seattle, WA.
Date of appointment: June 27, 1977. Appointed by President Carter.

MR. HUBERT T. TAYLOR, U.S. MARSHAL, NORTHERN DISTRICT OF WEST VIRGINIA

Born: February 28, 1914, Martinsburg, WV.
Education: High school graduate.
Military experience: U.S. Navy (1944–1947).
Professional experience: White House policeman, Washington DC (1942–1951). Special Investigator, Office of Price Stabilization, Washington DC (1951–1952). Deputy U.S. marshal, District of Columbia, Washington, DC (1952–1958). Store detective, security supervisor, and chief of security, Woodward & Lothrop Department Store, Washington DC (1958–1977).
Address: P.O. Box 832, Fairmont, WV.
Date of appointment: July 1977. Appointed by President Carter.

MR. JAMES P. HICKMAN, U.S. MARSHAL, SOUTHERN DISTRICT OF WEST VIRGINIA

Born: March 4, 1923, Charleston, WV.
Education: High school graduate.
Military experience: U.S. Air Force (1943–1945).
Professional experience: Instrument mechanic, Union Carbide Corp., Institute, WV (1953–1982).
Address: P.O. Box 2667, Charleston, WV.
Date of appointment: April 28, 1982. Appointed by President Reagan.

MR. ROBERT T. KEATING, U.S. MARSHAL, EASTERN DISTRICT OF WISCONSIN

Born: November 25, 1938, Appleton, WI.
Education: High school graduate.
Military experience: U.S. Marine Corps (1956–1961).
Professional experience: Lieutenant, Outagamie County Sheriff's Department, Appleton, WI (1962–1981).
Address: 517 East Wisconsin Avenue, Milwaukee, WI 53202.
Date of appointment: December 17, 1981. Appointed by President Reagan.

MR. FREDERICK N. FALK, U.S. MARSHAL, WESTERN DISTRICT OF WISCONSIN

Born: November 20, 1948, Edgerton, WI.
Education: BA, Winona State College (1973); BS, Milton College (1978).

Professional experience: Manager, Lake House Inn, Edgerton, WI (1974–1975). Substitute teacher, Edgerton School System, Edgerton, WI (1975–1976). Sheriff, Rock County, WI (1977–1981).

Address: P.O. Box 1706, Madison, WI.

Date of appointment: December 16, 1981. Appointed by President Reagan.

MR. DELAINE ROBERTS, U.S. MARSHAL, DISTRICT OF WYOMING

Born: January 15, 1933, Kemmerer, WY.

Education: High school graduate.

Military experience: U.S. Army (1953–1955).

Professional experience: Patrolman, Wyoming Highway Patrol, Cheyenne, WY (1960–1974). Sheriff, Lincoln County, WY (1974–1981).

Address: P.O. Box 768, Cheyenne, WY.

Date of appointment: November 12, 1981. Appointed by President Reagan.

[From the Miami Herald, Dec. 17, 1982]

MARSHAL CHARGED WITH CONSPIRING TO BRIBE WARDEN

(By Andy Rosenblatt and Peter Slevin)

Carlos C. Cruz, the U.S. marshal for the Southern District of Florida, and two other Dade men were indicted Thursday on charges of conspiring to bribe the warden of a federal prison.

FBI agents arrested Cruz in his office at 2:40 p.m., sealed his files and led him away in handcuffs.

Cruz, who has served as marshal for seven months, is charged with joining Seymour Klosky, an official with the Florida secretary of state's office, and Merle Alan Gottlieb, a North Miami Beach investor, in a conspiracy to bribe L. R. Putman, warden of the Metropolitan Correctional Center (MCI) in South Dade.

"I can walk with my head high. I'm not ashamed of anything I've done," Cruz said after he was released on his own recognizance. Klosky and Gottlieb could not be reached for comment.

The three men are accused of conspiring to bribe Putman with the expectation that he would arrange a transfer for Gottlieb's son, a convicted hashish dealer assigned to a federal prison in Tallahassee.

Putman went to the FBI instead.

The warden then met on several occasions with Klosky and Gottlieb who gave him $800 cash, cruise tickets, the use of a leased Toyota Tercel and, later, the title to a 1981 Chevrolet Malibu, according to a federal indictment returned Thursday.

In return, Klosky and Gottlieb allegedly asked Putman to transfer Gottlieb's son to the Metropolitan Correctional Center in South Dade, arrange furloughs from jail and support a move to reduce young Gottlieb's sentence.

The meetings, held at several Dade restaurants, between Sept. 13 and Dec. 8 were monitored by FBI agents, sources said.

Cruz is accused of "facilitating the making of offers and the giving of U.S. currency and automobiles to Warden L. R. Putman." He is charged with five counts of bribery and one count of conspiring to defraud the U.S.

Cruz attended six meetings where the bribery conspiracy was allegedly discussed including two meetings in the U.S. marshal's office.

Putman and Cruz first met at Arthur's Eating House, 1444 Biscayne Blvd. on Sept. 13, the indictment said, at which time Cruz introduced Putman to Klosky.

Cruz later met Putman in the marshal's office on Oct. 8 where they discussed transferring Gottlieb to the South Dade prison, the indictment said. During the meeting, Cruz allegedly urged that Putman accept an offer of free cruise tickets from Klosky, who was pushing for the transfer.

Cruz again met Putman in his own office on Nov. 5 to discuss Marc Gottlieb's status, the indictment said. After the meeting, Cruz allegedly sent a letter to the U.S. District Court urging that Gottlieb's 11-year prison sentence be reduced.

The indictment does not make clear what if anything Cruz received in exchange for his participation in the alleged bribery attempt.

"I'd like to understand myself," Cruz said.

Cruz, 41, who was sworn in as U.S. marshal on March 7, refused to discuss the indictment when reached Thursday night at his South Dade home.

The nomination of Cruz by U.S. Sen. Paula Hawkins sparked a controversy earlier this year after disclosures that Cruz had been forced to resign from the Metro-Dade Public Safety Department in 1969.

Former Department Director E. Wilson Purdy reportedly told Cruz he would have to quit or be fired after allegations that he disobeyed an order and then asked a supervisor to cover up his action.

Cruz disputed those published reports in 1981, saying he resigned from the department because he had tired of police work.

After turning in his police badge, Cruz worked at several jobs before attending the Florida State University Law School, from which he was graduated in 1977.

At the time of Cruz' nomination, Hawkins said she was aware of Cruz' resignation from the police department, calling it "a minor flap . . . a blip in his life that occurred a long time ago."

Thursday, the senator "was just heart-broken," about Cruz' indictment, press aide Henry Hicks said. Hicks noted that the nomination of Cruz was approved by the Justice Department after an FBI background investigation.

Cruz' arrest also shocked employees of the U.S. marshal's office.

"No one believed it," said one deputy marshal. "I thought he was a gentleman."

Chief Deputy Ron Evans will assume supervision of the office today.

"I can't figure it out," said one federal judge, "[Cruz] was held in very high regard. I thought he was doing a very good job."

Cruz, who was born in Guanabacoa, Cuba, had been active in Republican political circles before Hawkins selected him to replace Don Forsct, a career officer with the U.S. Marshal's Service.

Klosky, 63, who surrendered at FBI headquarters in Miami, was also released on a $50,000 bond. Gottlieb, 56, was being held Thursday night in lieu of a $250,000 bond.

Secretary of State George Firestone who made Klosky the head of his Miami regional office called the indictment "a total surprise." Firestone said his office would immediately open its own investigation of Klosky who oversees state licensing here.

Merle Gottlieb has a long history of arrests dating back to 1946 when he was charged with vagrancy. Gottlieb pleaded guilty in 1975 to federal mail fraud and arson charges. U.S. District Judge James Lawrence King placed Gottlieb on probation which ended on Nov. 1, 1978.

In 1979, Gottlieb's son, Marc, was convicted by a federal jury in Fort Lauderdale of trafficking in hashish.

June 20, 1984

H.R. 4249
U.S. Marshalls Service and Witness Security Reform Act of 1983

Summary of Costs		(Dollars)
Security		
Inspector, Regular Hours	40 x $13.47	540
Overtime	104 x $16.10	1,670
Per Diem	4 inspectors x 3 days @ $75/day	900
Travel	4 inspectors x $400	1,600
Mileage	700 miles @ $.20/mile	140
Command Post	1 or 2 sites @ $75/day	150
		5,000
Witness and Child		
Travel, 1 adult and 1 child		600
Subsistence	3 x $57	170
Hotel	2 x $70	140
		910
Non-Program Parent		
Travel, 1 adult		400
Subsistence	2 x $30	60
Hotel	1 x $70	70
		530
Cost/Visit		6,440
Cost/family	12 months/year	77,300
Total Cost	247 families	19,100,000

Factors Which Could DECREASE the Cost of H.R. 4249

Number of Participants. Two hundred forty-seven witnesses currently in the program who also have children in the witness protection program would be eligible for visitation rights as provided in H.R. 4249, although not all would participate. Until notified, however, the USMS has no way of determining participation levels. Around the beginning of fiscal year 1984, the USMS began consistently offering monthly visits if requested. The 37 witnesses who had children from previous marriages or liaisons who joined the program in 1984 might be excluded from the total of 247 families, if one assumes that they are receiving these benefits under current law.

Factors Which Could INCREASE the Cost of H.R. 4249

Additional Security Requirements. The USMS has assumed minimum security requirements in its estimate. Certain witnesses and their family members may require additional security measures.

Multiple Non-Program Parents. The estimate assumes only one monthly visit per 247 families. Several of the witnesses have children from more than one relationship, however. Data regarding these relationships are not available.

Court-Ordered Requirements. While the bill would allow some adjustment in the visitation rights as determined by the courts, the report language specifies that the change must not be substantive. This suggests that while the site of the location might be changed for security reasons, the amount of time in aggregate could not substantially be altered. The USMS has assumed only one two-day visit per month for each family, which is considered a minimum by the Committee (Congressional Record, May 21, 1984, page H. 4196). It is likely that visitation rights of the parent without custody would exceed 24 days annually in some cases.

Additional Family Members. Travel and other costs for more than one child were not included, although they are not expected to be significant relative to the overall cost per visit. Certain states also allow other family members, such as grandparents, the right to visit children in divorce cases. Data regarding these situations are not currently known.

Administration. According to the USMS, an additional $2.7 million in administrative expenses would be incurred to initiate, monitor, implement, and track these visits.

New Families. Because of current USMS policy, it was assumed that the cost of monthly visitation for new families joining the program would be covered under current law, and not by the bill. Thus, even though the program is growing by approximately 300 participants annually (a portion qualifying for visitation rights), the cost estimate did not assume an annual increase in the number of families receiving this benefit as a result of H.R. 4249. (Nor did the estimate assume a decrease, because the child custody provisions usually continue until age 18, and the age of all the children involved were not known.)

Backward Visits. Witnesses that are currently in the program and whose children are not in the program have not been included in the 247 families assumed as likely participants in the program. The cost of family visitation is considerably less for these families than for the families with children in the program, because the security costs are less.

VISITATION COSTS

Estimate of security detail with 5 Witness Security Specialists* commencing at noon Friday and ending at noon Monday (visit actually conducted Friday evening through Sunday afternoon).

USMS Costs

Inspector regular hours (40 hrs x $13.47)	$538.80
Inspector OT hours (104 hrs. x $16.10)	$1,674.40
Inspector per diem (4 Insp. x 3 days @ $75)	$900.00
Inspector travel (4 Insp. x $400 avg)	$1,600.00
Mileage (700 miles @ $.20)	$140.00
Commandposts (1 nights x $75)	$75.00
(2 days x $75)	$150.00
Subtotal	$5,078.20

WITNESS and CHILD COSTS

Travel (1 adult ticket and 1 child ticket)	$600.00
Subsistence ($57 x 3 days)	$171.00
Hotel ($70 x 2 days)	$140.00
Subtotal	$911.00

NON-PROGRAM PARENT

Travel	$400.00
Subsistence ($30 x 2 days)	$60.00
Hotel ($70 x 1 day)	$70.00
Subtotal	$530.00

TOTAL	$6,519.20
TOTAL x 12 months	$78,230.40

9-21.000 PURPOSE AND SCOPE

9-21.010 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice attorneys with respect to Title V of the Organized Crime Control Act of 1970, and to prescribe the procedure for establishing a person as a protected witness.

9-21.020 Scope

These procedures apply to all organizations within the Department of Justice.

Title V of Public Law 91-452 (note preceding 18 U.S.C. § 3481) authorizes the Attorney General to provide for the security of government witnesses and potential government witnesses whose lives or persons are placed in jeopardy by virtue of being a witness or intended witness in legal proceedings against any person alleged to have participated in an organized criminal activity. The Attorney General may also provide protection for relatives and associates whose lives are endangered by virtue of their relationship to the witness.

28 U.S.C. § 524 provides authority to use appropriations of the Department of Justice for the payment of ". . . compensation and expenses of witnesses and informants, all at the rates authorized or approved by the Assistant Attorney General for Administration . . .

9-21.100 ELIGIBILITY

A witness may be considered for the Witness Security Program if the person is an essential witness in a specific case that is important in the administration of criminal justice and has a nexus to organized criminal activity, where there is clear evidence that the life of the witness or a family member is in immediate jeopardy.

In order for the Office of Enforcement Operations, Criminal Division, to facilitate the processing of a request for entry of an individual into the Witness Security Program, an application form has been designed to cover the information needed to support the request. This form includes a summary of the testimony to be provided by the witness and other information evidencing the witness' cooperation.

To avoid the necessity of making follow-up calls, please note the following:

A. In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the program, either appear and testify before the grand jury or in some other manner have committed himself/herself to providing this testimony at trial (i.e., a written statement was consensually monitored, etc.)

B. As you are aware, the Department is obligated to provide for the safety and welfare of the witness long after he/she has testified. The protection and possible relocation of the witness and his/her family are both expensive and complicated. It is imperative, therefore, that the entry of a witness into the Program be made only after it has been determined by the sponsoring attorney that the witness' testimony is credible, significant, and certain in coming.

Witness Security Program application forms and instructions are available from the Office of Enforcement Operations, Criminal Division, P.O. Box 7600, Ben Franklin Station, Washington, D.C. 20044-7600.

9-21.110 Responsibility of Local Authorities

The protection of a witness and his/her family is ordinarily the responsibility of local authorities and the implementation of federal protection requires a determination that local authorities are unable to provide adequate protection.

9-21.120 Informants

Informants are the responsibility of the investigative agency that the informant has assisted. An informant is not eligible for participation in the Witness Security Program unless he/she becomes a witness.

9-21.121 Utilization of Federal Prisoners in Investigations

All requests from investigative agencies to utilize federal prisoners in investigations, when consensual monitoring devices, furloughs, or extraordinary transfers are necessary must be referred to the Office of Enforcement Operations for review and coordination with the Bureau of Prisons. The requests must be endorsed by the appropriate investigative agency headquarters. Upon completion of the review, the Office of Enforcement Operations will make a recommendation to the Director, Bureau of Prisons. The requestor will be advised of the decision of the Bureau of

Prisons by the Office of Enforcement Operations. The Bureau of Prisons will coordinate directly with the requestor.

Requests for utilization of federal prisoners in an undercover capacity should be addressed to the personal attention of the Director or the Associate Director, Office of Enforcement Operations, P.O. Box 7600, Ben Franklin Station, Washington, DC 20044-7600.

In exigent circumstances, telephonic assistance will be provided. The information provided will be held in the strictest confidence, and no dissemination of the information will be made without prior approval from the appropriate agency or office.

9-21.130 Prisoner-Witness

Prisoners in a state or federal institution are eligible for participation in the Witness Security Program providing all other criteria are met. If the prisoner is in state custody, the state must agree to the prisoner serving his/her sentence in a federal institution. Application should be made as prescribed for other witnesses.

9-21.140 State and Local Witnesses

Title V of Public Law 91-452 authorizes the Attorney General, at his/her discretion, to protect state and local witnesses. This may be conditioned upon reimbursement in whole or in part. The terms of reimbursable agreements will be determined by the U.S. Marshals Service. Requests from local authorities should be directed to the U.S. Attorney or Strike Force Chief, and should contain the same information required for requests submitted by U.S. Attorneys. The U.S. Attorney or Strike Force Chief should review the application and furnish his/her recommendation to the Office of Enforcement Operations for consideration.

9-21.200 APPROVAL AUTHORITY

9-21.210 Approval Procedure

Approval of requests for protection will be made by the Director of Associate Director of the Office of Enforcement Operations. The approval will be conveyed to the Director, U.S. Marshals Service and/or the Director, Bureau of Prisons, by memorandum.

9-21.220 Emergency Authorization

Protection of a witness for whom relocation is being requested remains the responsibility of the investigative agency until such time as the Office of Enforcement Operations has reviewed the request (and the Marshals Service preliminary interview), approved admission of the witness to the program, and the U.S. Marshals Service has had the opportunity to arrange for the safe removal of the witness and his/her family. The Director or Associate Director may authorize emergency relocation when in their judgment exceptional circumstances exist.

9-21.300 PRE-ENTRY INTERVIEWS

9-21.310 Representatives and Promises

Investigative agents and attorneys are not authorized to make representations to witnesses regarding funding, protection, or other Program services. These matters are for decision by authorized representatives of the U.S. Marshals Service only. Representations or agreements made without authorization will not be honored by the U.S. Marshals Service.

9-21.320 Expenses

Any expenses incurred by investigative agencies or divisions for witnesses and/or their dependents prior to approval by the Office of Enforcement Operations are the responsibility of the concerned agency or division.

9-21.330 Witness Interviews

The U.S. Marshals Service will interview prospective witnesses prior to their entry into the Program. This initial interview will serve two purposes; first, it will insure that the prospective witness understands what can be expected from the Program; and second, it will allow the Marshals Service to evaluate potential problems with a view toward resolving them as quickly as possible.

Interviews will be arranged when a formal request for entry into the Program is received. It will, therefore, be necessary that the Office of Enforcement Operations be advised of the witness' likely entry into the Program as soon as it appears that the individual will be a witness, will be endangered, and will, therefore, need to enter the Witness Security Program.

9-21.340 Psychological/Vocational Testing

In order to facilitate a witness' successful relocation and adjustment, a psychological evaluation of the prospective witness is performed. Since the report of the psychologists may contain information which is discoverable as *Brady* material in the criminal prosecution in which the witness is testifying, all materials submitted to the U.S. Marshals Service by the psychologists must be submitted to the Office of Enforcement Operations by the U.S. Marshals Service for review and forwarding to the appropriate U.S. Attorney's office.

9-21.350 Polygraph Examinations for Prisoner-Witness Candidates

A polygraph examination is required of all Witness Security candidates who are incarcerated in order to maintain the security of those individuals who are now, or will be housed in a Bureau of Prisons facility. Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or information obtained from such witness.

9-21.400 Procedures for Securing Protection

Requests for protection of witnesses must be made as soon as it appears likely the individual will be a witness and likely need relocation. A witness is *not* to be publicly disclosed, thereby endangering his/her life or that of his/her family, without the prior authorization of the Office of Enforcement Operations. It is incumbent upon each U.S. Attorney, his/her Assistants and the investigative agencies to present to the Office of Enforcement Operations at the earliest possible time during the investigative process the request for authorization to place an individual in the Witness Security Program. This will allow time for U.S. Marshals Service preliminary interview, appropriate review, and the actual preparation of assistance by the Marshals Service, minimizing the disruption both to the witness and the Service.

United States Attorneys and Division Attorneys should transmit requests by memorandum or teletype to the Office of Enforcement Operations. Communications should be addressed to the Director, Office of Enforcement Operations, P.O. Box 7600, Ben Franklin Station, Washington, D.C. 20044-7600, or teletyped to Office of Enforcement Operations, Criminal Division. These requests must be signed by the United States Attorney or Criminal Division Field Office Chief. The request must include the following information:

A. *Identification of the Witness.*—Name, address, date and place of birth, sex, race, citizenship, FBI or police numbers of witness. Attach copy of witness' record of arrests and convictions, if any.

B. *Significance of the case(s).*—Importance of the case and names, locations and importance of prospective defendants. Describe illegal organization in which the defendants are participants and their respective roles. U.S. Attorney's case number must be included. Defendant's arrest and conviction record must be attached. If applicable, whether case is or is not a Narcotic Task Force investigation.

C. *Expected Testimony of the Witness.*—A summary of the testimony to be provided by the witness.

Copies of indictments, compliants, prosecutive memoranda, etc., must be attached fully describing the nature of the case. List all cases in which the witness is expected to testify. List all agencies which may make use of the witness' information.

D. *Trial Dates.*—A realistic estimate of the trial date and trial completion (with respect to each trial in which the witness is expected to testify).

E. *Other Witnesses.*—The names of individuals for whom witness protection has previously been approved in connection with the same case; also, the names and locations of any other individuals connected with this case likely to be placed under the Witness Security Program.

F. *Threat.*—A comprehensive recitation of the danger to the witness. List all individual known or believed by the U.S. Attorney to pose a threat to the witness. Include complete names and addresses and request the investigative agency to forward photographs of each if available. If not available, so indicate. Include any individuals incarcerated who may pose a threat to the witness in prison and upon their release. Additionally, the investigative agency must submit a report concerning the danger to the witness to its Washington headquarters for review. The headquarters will forward the report, along with its recommendation, to the Office of Enforcement Operations.

G. *Members of Witness' Household.*—List by name, date and place of birth and relationship to the witness those persons recommended for relocation.

H. *Assets and Liabilities.*—A complete recitation of the witness' financial posture to include real and personal property value, debts, alimony, support payments,

mortgages, bank accounts, pensions, securities, income and information concerning monies which the witness receives or expects to receive from other state or federal agencies.

I. *Medical Problems.*—A complete recitation of all medical problems experienced by the witness and members of his/her household, including any history of drug abuse.

J. *Parole/Probation.*—Indicate any parole or probation restrictions for the witness and members of his/her household.

9-21.500 Responsibilities and Prerogatives of the U.S. Marshals Service

When it is determined that a witness is to enter the Program the witness and adult members of his/her family will be asked to sign a Memorandum of Understanding. The U.S. Marshals Service will be obligated to satisfy each commitment documented and will not be required to provide amenities not included in the document.

9-21.510 Witness Services

The Marshals Service will be responsible for providing the witness with one reasonable job opportunity, and will provide a second opportunity when the witness has a persuasive reason for rejecting the first. The Marshals Service will also provide assistance in finding housing, will provide identity documents for witnesses and family members whose names are changed for security purposes, and will arrange for severely troubled witnesses and family members to receive counseling and advice by psychologists, psychiatrists, or social workers when requested.

In cases in which the Witness Security Program is used to protect the government's witnesses, sentencing judges should be made aware of the additional cost to the government for their consideration of fines. The amount spent for each witness may be obtained from the U.S. Marshals Service Witness Security Inspector in the district.

Similarly, in cases in which relocated witnesses themselves have been convicted of crimes after relocation, sentencing judges should be made aware of the assistance and amount of subsistence furnished by the government to relocate the witness.

Additional information may be obtained from the Office of Enforcement Operations, Criminal Division, FTS 633-3684.

9-21.50 Subsistence Guidelines

The Director, U.S. Marshals Service, shall administer Witness Security Program funds. The Witness Security Division, U.S. Marshals Service, will supervise the administration of subsistence funds under guidelines set forth by the Director based upon Department of Labor cost of living indices.

Witnesses who are able to support themselves and their family and/or household members will not be furnished subsistence funding assistance.

The U.S. Marshals Service will make every effort to assure that protected persons pay debts for which the Department is furnishing funds and return loaned property provided by the government. If necessary, final subsistence allowances will be withheld until all such debts are cleared and loaned property recovered.

Maintenance allowance assistance will normally be provided until the protected witness has obtained employment or is self-sufficient by other means of income. Subsistence shall terminate not later than six months after the first payment, or once employment is secured, whichever is earlier. The prosecutor will be advised of the scheduled termination of a witness' funding, and invited to comment.

An extension for no longer than 90 days may be authorized when circumstnces beyond the control of the witness so dicate.

9-21.530 Employment of Protected Witnesses

Protected witnesses are expected to become self-sufficient as soon as possible after acceptance into the Program. The U.S. Marshals Service will endeavor to assist the witness to find employment but the witness himself is expected to aggressively seek employment. Under no circumstances will witnesses be considered "entitled" to subsistence payments until they have testified. Failure to aggressively seek employment or rejection of an employment opportunity will be grounds for discontinuance of subsistence payments.

9-21.540 Complaint System

A formal system for receiving and handling complaints will be established, as follows: Any complaints will be made in the first instance to the Witness Security Specialist in the field. When a complaint is made, a copy of the specialist's report will go to the Office of Enforcement Operations. If the specialist cannot resolve the com-

plaint, the complaint will go to the U.S. Marshal for the district. Complaints that cannot be resolved by the district Marshal can be referred to headquarters, to be resolved by the Witness Security Division and the Office of Enforcement Operations.

In cases where either the U.S. Attorney, Strike Force or investigative agency deem it appropriate, witnesses' complaints may be transmitted to the Office of Enforcement Operations for review.

9-21.600 Prisoner witnesses

A. *Prosecutor's Responsibility.*—The prosecutor handling a case, whether an Assistant U.S. Attorney or a division attorney, will be responsible for notifying the Office of Enforcement Operations when a prisoner witness or potential prisoner witness is cooperating with the government, and from whom that person should be separated, whether or not the witness is formally in the Witness Security Program. The Office of Enforcement Operations will then coordinate the placement of the prisoner with the Bureau of Prisons, and in conjunction with the Office of Enforcement Operations, will monitor the movement of cooperating witnesses, including protected witnesses, when they are moved from one federal facility to another or back and forth from federal to state custody (on writs of habeas corpus ad testificundum or otherwise), to make sure that they are not housed even on a temporary basis in facilities where persons from whom they are to be separated are also housed.

The following information concerning prisoner witnesses must be provided:

1. Name of offender,
2. Date of birth,
3. Race and Sex,
4. Whether state or federal prisoner (if state, reimbursable or nonreimbursable),
5. Current offense,
6. Current sentence (and Judge's name),
7. FBI rap sheet,
8. Outstanding warrants or detainers,
9. Names of all those from whom witness should be separated, FBI numbers and current locations,
10. Presentence investigation and/or prison classification material,
11. Judgment and commitment papers, and
12. Bail bond status.

From time to time, the U.S. Attorney's office may be requested to assist the U.S Marshals Service in securing appropriate documents for prisoner/witnesses. The U.S. Marshals Service Witness Security Inspector will assure that Judgment and Commitment papers in the prisoner witness' new name will be delivered to the institution with the prisoner witness. A second set of Judgment and Commitment papers in the witness' original name will be forwarded to Bureau of Prisons Headquarters in Washington, D.C.

B. *Bureau of Prisons.*—Special prisoner designations will be made by Bureau of Prisons as they deem necessary. U.S. Marshals Service involvement in these instances will be limited to insuring the proper security when it is necessary for the prisoner to be transported from one institution to another or back to the danger area for interview and/or trail. When the prisoner witness is released from incarceration, relocation services will be provided if it is deemed necessary by the Office of Enforcement Operations. The Bureau of Prisons has advised that because of the extraordinary difficulty in determining the appropriate institution for the safe housing of a prisoner/witness, it is imperative that they be furnished the following information on all persons who have been identified as posing a threat to the witnesses and who are likely to come into federal custody.

1. Name,
2. Alias,
3. Date of birth,
4. FBI #,
5. Race,
6. Sex,
7. Ethnic origin,
8. Offense/Charge, and
9. State of appeal, fugitive escape, non-incarcerated, etc.

Compliance in providing this information will enable the Bureau of Prisons to adequately monitor the separation needs of protected prisoner/witnesses.

The information should be provided to the Office of Enforcement Operations at the time witness protection is being requested for a prisoner/witness in accordance with USAM 9-21.600, infra.

C. *Metropolitan Correction Centers (MCC)* will be used primarily to house protected prisoner witnesses during periods of debriefing, grand jury, and trial. Ordinarily, prisoner witnesses will not serve their sentences at an MCC. Requests to house prisoner witnesses at an MCC must be directed to the Office of Enforcement Operations for consideration.

D. *Interviews of Prisoner Witnesses* must be arranged through the Office of Enforcement Operations. Requests must be submitted at least ten (10) working days in advance and must include all the information required for regular witnesses. The Office of Enforcement Operations will coordinate all requests with the U.S. Marshals Service and the Bureau of Prisons. Bureau of Prisons will not allow prisoner witnesses to be interviewed without prior authorization from the Office of Enforcement Operations.

9-21.700 REQUEST FOR WITNESS' RETURN TO DANGER AREA

Attorneys should make requests for the appearance of a relocated witness for trial or pre-trial conferences to the U.S. Marshals Service Witness Security Specialist in their district at least TEN (10) WORKING DAYS in advance of the requested appearance date. Requests should include purpose, date, estimated duration of the appearance, place, time, and, if applicable, name of responsible person to report to (if other than the requestor).

Investigative agents should make requests for the appearance of a protected witness through the authorized agency channels to the Office of Enforcement Operations, Criminal Division, for approval. Requests should include purpose, date, and estimated duration of the appearance, and if applicable, other persons to be present in addition to the requestor. The Office of Enforcement Operations will forward approved requests to the Witness Security Division, U.S. Marshals Service. The Witness Security Division, U.S. Marshals Service, will determine the place for the meeting and advise the requestor.

Communications should be addressed to Director, Office of Enforcement Operations, P.O. Box 390, Benjamin Franklin Station, Washington, D.C. 20044. In case of emergency, you may contact the office telephonically at 633-3684. In order to conserve the Marshals Service's personnel resources however, emergency requests should be avoided. Prosecutors and investigators may be requested from time to time to conduct interviews in neutral sites which will substantially reduce the personnel requirements of the Marshals Service.

During the witness' appearance in the danger area, it will be the responsibility of the prosecutor and the investigative agents to ensure that maximum use is made of the witness' time. In the interests of security and limiting the expense involved, the witness must be returned to the relocation area as soon as possible.

9-21.800 USE OF RELOCATED WITNESSES AS INFORMANTS

A witness having entered the relocation program, hereafter referred to as a protected witness, maintains a continuing and unique relationship with the Department.

Even after subsistence allowances and other material support are terminated, the residual relationship requires that investigative agencies and attorneys observe certain restraints in dealing with these persons insofar as investigation and/or new cases are concerned.

Once an individual has been accepted into the Witness Security Program neither the witness nor any individual relocated because of the witness' cooperation may be used as an informant.

Similarily, neither the witness nor any individual relocated because of the witness' cooperation may be used as a witness in a case other than the one for which the witness was placed in the program without the consent of the Office of Enforcement Operations.

9-21.900 MISCELLANEOUS

9-21.905 Dual Payments Prohibited

The U.S. Marshals Service is authorized to provide for the maintenance and housing of protected witnesses whenever they appear for trial, pre-trial conferences or return to a danger area for other appearances approved by the Office of Enforcement Operations. The Marshals Service is authorized to pay for the costs of travel

and other associated maintenance expenses. Attorneys should not prepare "Fact Witness Certificates" and Fact Witness fees and allowances should not be disbursed to protected witnesses who are under the protection and maintenance of the U.S. Marshals Service. (Witnesses who voluntarily withdraw from participation in the Protected Witness Program are exempt from this restriction.)

9-21.910 Use of Department of Defense Facilities

All requests to use Department of Defense facilities for protected witnesses must be made through the Office of Enforcement Operations.

9-21.915 Special Handling

All documents relating to a protected witness or an individual nominated for protection will be accorded special handling to insure disclosure on a strict "need to know" basis. All documents should be marked with the security designation "Sensitive Investigation Matter."

9-21.920 Relocation Site

The area of relocation must not be known to the case attorney or his/her staff since all contact with the witness should be through the Office of Enforcement Operations. The witness should be instructed to keep secret the area of his/her relocation and all associated matters.

9-21.925 Duty Officers

The U.S. Marshals Service can be reached after hours at 285-1100.

The Office of Enforcement Operations duty officer may be reached at 202-633-3684 or 202-633-2000.

The Bureau of Prisons duty officer may be reached at 202-734-3036 or 202-633-2000 (after hours).

9-21.930 Other Requests

A. *Requests by members of Congress or their staffs* shall be forwarded to the Office of Legislative Affairs who in turn will refer the requests to the Office of Enforcement Operations for processing.

B. *Requests by the news media or public* should be referred to the Office of Public Information.

C. Other inquiries not covered in this order should be referred to the Office of Enforcement Operations.

9-21.935 Training

The Marshals Service, Bureau of Prisons, and Criminal Division will coordinate special training about the Witness Security Program to be given to Deputy Marshals, Bureau of Prisons personnel, investigative agents, Assistant U.S. Attorneys, and Criminal Division attorneys.

9-21.940 Continuing Protection Responsibilities

Witnesses in the program undertake the duty of providing testimony in criminal investigations and trials. Protection will be provided during the performance of those duties. After the testimony is completed and any relocation is accomplished, the government will have no further obligations to the witness except that if there is clear evidence that the witness is in immediate jeopardy arising out of the former cooperation, through no fault of the wintess, further protective services will be considered.

9-21.945 Witness Security Program Policy Board

There will be established in the Deputy Attorney General's office a Witness Security Program Policy Board, which will review policy issues and budgetary requirements for the program semi-annually. The Board will include the Deputy Attorney General, the Assistant Attorneys General for the Criminal Division and Administration, the U.S. Attorneys, the Directors of the U.S. Marshals Service and the Bureau of Prisons, the Director and Associate Director of the Office of Enforcement Operations, and the Director of the Marshals Service Witness Security Division.

9-21.950 Arrests of Relocated Witnesses

Should a relocated witness be arrested after entering the Program, every effort will be made by the Department to protect his/her new identity.

However, no effort will be made to interfere with legitimate legal procedures. The Office of Enforcement Operations must be notified any time a relocated witness is arrested.

9–21.955 Results of Witnesses' Testimony

The Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General reflecting the results of the testimony provided by relocated witnesses. Prosecutors will be asked to provide the following information on a semi-annual basis:

A. Name of witness:

B. Name of case:

C. Jurisdiction:

D. Did the witness testify before grand jury? Trial? If the witness did not testify, why not?

E. Status of witness in cases: 1. Defendant; 2. unindicted co-conspirator; 3. prisoner; 4. victim; and 5. other.

F. Names of all defendants:

G. Statutory violations charged:

H. Date of indictment:

I. Date of conviction:

J. Disposition of the case as to each defendant:

K. If convicted, details of sentence imposed on each defendant, including fines levied, etc.:

L. Any information as to significant forfeitures or seizures accomplished because of assistance of witness:

M. Any information as to contributions made by this witness to the law enforcement effort, federal, state, and local, in your district and elsewhere; as a result of your request to place this witness in the program, i.e., furnishing probable cause for Title III's search warrants, location of fugitives, etc.

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

September 27, 1983

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Results of Witnesses' Testimony

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of 9-21.955.

AFFECTS: USAM 9-21.955

The following should be substituted for 9-21.955:

9-21.955 Results of Witnesses' Testimony

The Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General reflecting the results of the testimony provided by relocated witnesses. Prosecutors will be asked to provide the following information on a semi-annual basis:

1. Name of witness:

2. Name of case:

3. Jurisdiction:

4. Did the witness testify before grand jury? Trial? If the witness did not testify, why not?

5. Status of witness in case:

   a. Defendant
   b. Unindicted co-conspirator
   c. Prisoner
   d. Victim
   e. Other

6. Names of all defendants:

7. Statutory violations charged:

8. Date of indictment:

9. Date of conviction:

10. Disposition of the case as to each defendant:

11. If convicted, details of sentence imposed on each defendant, including fines levied, etc.:

12. Any information as to significant forfeitures or seizures accomplished because of assistance of witness:

13. Any information as to contributions made by this witness to the law enforcement effort-federal, state, and local in your district and elsewhere-as a result of your request to place this witness in the program, i.e., furnishing probable cause for Title III's, search warrants, location of fugitives, etc.:

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

September 27, 1983

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Eligibility

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of 9-21.100.

AFFECTS: USAM 9-21.100

The following should be added to the ELIGIBILITY section:

In order for the Office of Enforcement Operations, Criminal Division, to facilitate the processing of a request for entry of an individual into the Witness Security Program, an application form has been designed to cover the information needed to support the request. This form includes a summary of the testimony to be provided by the witness and other information evidencing the witness' cooperation.

To avoid the necessity of making follow-up calls, please note the following:

In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the Program, either appear and testify before the grand jury or in some other manner have committed himself/herself to providing this testimony at trial (i.e., a written statement, was consensually monitored, etc.).

As you are aware, the Department is obligated to provide for the safety and welfare of the witness long after he/she has testified. The protection and possible relocation of the witness and his/her family are both expensive and complicated. It is imperative, therefore, that the entry of a witness into the Program be made only after it has been determined by the sponsoring attorney that the witness' testimony is credible, significant and certain in coming.

Witness Security Program application forms and instructions are available from the Office of Enforcement Operations, Criminal Division, P. O. Box 7600, Ben Franklin Station, Washington, D.C. 20044-7600.

39-711 - 85 - 10

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

September 27, 1983

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Psychological/Vocational Testing; Polygraph Examinations for Prisoner-Witness Candidates

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of 9-21.400.

AFFECTS: USAM 9-21.340 and 9-21.350

The following new sections should be added:

9-21.340 Psychological/Vocational Testing

In order to facilitate a witness' successful relocation and adjustment, a psychological evaluation of the prospective witness is performed. Since the report of the psychologists may contain information which is discoverable as Brady material in the criminal prosecution in which the witness is testifying, all materials submitted to the U.S. Marshals Service by the psychologists must be submitted to the Office of Enforcement Operations by the U.S. Marshals Service for review and forwarding to the appropriate United States Attorney's Office.

9-21.350 Polygraph Examinations for Prisoner-Witness Candidates

A polygraph examination is required of all Witness Security candidates who are incarcerated in order to maintain the security of those individuals who are now, or will be housed in a Bureau of Prisons facility. Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or information obtained from such witnesses.

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

September 27, 1983

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Stephen S. Trott
Assistant Attorney General
Criminal Division

RE: Witness Services

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of 9-21.520.

AFFECTS: USAM 9-21.510

The following should be added to the Witness Services section:

In cases in which the Witness Security Program is used to protect the Government's witnesses, sentencing judges should be made aware of the additional cost to the Government for their consideration of fines. The amount spent for each witness may be obtained from the U.S. Marshals Service Witness Security Inspector in the district.

Similarly, in cases in which relocated witnesses themselves have been convicted of crimes after relocation, sentencing judges should be made aware of the assistance and amount of subsistence furnished by the Government to relocate the witness.

Additional information may be obtained from the Office of Enforcement Operations, Criminal Division, FTS 633-3684.

JUNE 7, 1984

HONORABLE WILLIAM FRENCH SMITH
U.S. ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
10TH AND CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20530

DEAR MR. ATTORNEY GENERAL:

SHORTLY BEFORE THE HOUSE OF REPRESENTATIVES VOTED ON H.R. 4249 (RELATING TO THE WITNESS PROTECTION PROGRAM AND THE MARSHALS SERVICE) THE DEPARTMENT OF JUSTICE ATTEMPTED TO REGISTER SOME OBJECTIONS TO THE BILL. IN PARTICULAR CONCERN WAS EXPRESSED ABOUT THE PROVISIONS OF THE BILL RELATING TO CHILD CUSTODY AND VISITATION. AS SUPPORTERS OF BOTH THE BILL, AND THE AMENDMENT OF MR. FRANK ON CHILD CUSTODY AND VISITATION, WE ARE DISAPPOINTED IN THE DEPARTMENT'S LAST MINUTE ATTEMPTS TO DEFEAT THIS BILL.

PERHAPS THE LEVEL OF OUR DISAPPOINTMENT CAN BE BETTER UNDERSTOOD WITH A REVIEW OF THE LEGISLATIVE HISTORY OF THIS BILL. EARLY THIS CONGRESS, THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE HELD HEARINGS ON THE WITNESS PROTECTION PROGRAM. DURING THOSE HEARINGS MR. FRANK EXTENSIVELY QUESTIONED THE DEPARTMENT'S WITNESSES ABOUT THE NATURE AND EXTENT OF VISITATION AFFORDED TO UNRELOCATED PARENTS. DURING THAT HEARING THE DEPARTMENT INDICATED THAT THERE WAS NO INFORMATION CONCERNING THE FREQUENCY WITH WHICH THE WITNESS PROTECTION PROGRAM RESULTED IN A DISRUPTION OF VISITATION OR CUSTODY RIGHTS. AFTER THE HEARING COMMITTEE STAFF MEET WITH REPRESENTATIVES OF THE DEPARTMENT AND ASKED FOR ASSISTANCE IN FASHIONING A RESPONSE TO THIS PROBLEM. IT SHOULD BE NOTED PARENTHETICALLY THAT THIS PROBLEM SHOULD HAVE RECEIVED HIGH LEVEL ATTENTION ANYWAY AFTER THE DEPARTMENT HAD LOST TWO COURT OF APPEALS CASES ON THIS ISSUE.* DESPITE THIS REQUEST THE COMMITTEE RECEIVED NO FORMAL RESPONSE.

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*FRANZ V. UNITED STATES, 707 F. 2D 582, OPINIONS CONTINUED, 712 F. 2D 1428 (D.C. 1983); RUFFALO V. CIVILETTI, 702 F. 2D 710 (8TH CIR. 1983).

In July of 1983 the Committee wrote to the Department concerning the potential cost of providing for visitation. In a response dated October 1983 the Committee was informed that "no historical statistics" are kept about the frequency of visitation problems.

Next, in January of 1984 during a meeting with Subcommittee Chairman Kastenmeier the Director of the Marshals Service was given a copy of an amendment on child custody to be offered by Mr. Frank. At that time a specific request was made for the Department's views. Despite all of these attempts accommodating the Department no views were received by the Committee either before or immediately after the Committee reported this bill.

The only apparent Congressional communication the Administration has made on this bill is a statement of opposition prior to a vote on the floor. Then, apparently after the House adopted the measure the Department told the Congressional Budget Office that the cost of the visitation amendment would be $19, 662,000. This very precise figure was never shared with the Committee. Indeed some of the assumptions which went into this estimate are highly questionable.** Moreover, the estimate never answers the original question posed to the Department: How many parent child visitation relationships have been severed by the witness protection program, what has the Department done in response to this problem, and how much is being spent currently to assure maintance of family rights? Without complete answers to these questions the cost estimate is meaningless. It would, therefore, seem incumbent upon the Department to provide the Committee with the kind of detailed analysis we originally requested of both current and projected costs based on H.R. 4249.

In closing we wish to reiterate our willingness to work with the Department to respond to the difficult problems posed by child custody and visitation issues in the context of protected witneses. Although the Committee has made every conceivable effort at dialogue, we are willing to do more. We have even succeeded in having the House act to increase the Department's appropriation by up to $5 million dollars for the Marshals Service (especially including visitation costs).

**Apparently 247 witnesses have minor children with whom unrelocated parents have some visitation rights. The Department claims that the cost of providing one visit would be over $6,000 and involve Service Marshals.

GIVEN THE OVERWHELMING VOTE IN THE HOUSE ON THIS ISSUE, WE HOPE WE CAN NOW AGREE TO WORK TOGETHER TO SECURE PASSAGE OF A BILL IN THE SENATE WHICH WILL ACCOMODATE BOTH OF OUR CONCERNS.

SINCERELY,

PETER W. RODINO, JR.

ROBERT W. KASTENMEIER

HAMILTON FISH, JR.

CARLOS J. MOORHEAD

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Fish 3

Office of the Assistant Attorney General

Washington, D.C. 20530

02 AUG 1984

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your letter of June 7, 1984, co-signed by Representatives Fish, Kastenmeier and Moorhead, concerning the position of the Department of Justice with respect to H.R. 4249.

We regret our lateness in commenting on certain aspects of the bill and appreciate your willingness to consider our concerns. In this regard, I should make clear that we favor the thrust of this bill to the extent that it seeks to provide detailed statutory authorization for the Witness Security Program. We believe, however, that several aspects of H.R. 4249 are seriously defective and require further study.

Pursuant to the meeting that officials of the Department had with Representative Barney Frank in late May, we submitted to Chairman Kastenmeier the enclosed June 21 report describing in some detail several of our major concerns with H.R. 4249. Because Representative Frank indicated at that meeting that he did not wish to receive comments related to our concerns over the budgetary impact of certain provisions of H.R. 4249, the enclosed letter does not address our strongly held view that there should be a rule of reasonableness with respect to the obligations of the Government to absorb costs associated with child custody and visitation. Neither does it discuss our deep concern over creation of a special victim compensation program for persons injured by protected witnesses. We also have serious reservations concerning proposed Sec. 2521 (b)(1)(F).

In light of your willingness to consider all our concerns with H.R. 4249, we here comment briefly upon three aspects of the bill not addressed in our June 21 report. First, the Department of Justice shares the desire of the Committee to comply fully with State court child custody orders including the provisions of

such orders pertaining to visitation between Program children and their non-Program parents. Our concerns in this area relate to our ability to carry out our obligations under H.R. 4249, even with the proposed $5 million appropriation increase. In this regard, it has consistently been our position that State court custody orders should be subject to a rule of reasonableness in terms of frequency of visitation. As H.R. 4249 is written, State judges could order twice weekly visitation if they so desire with the result that taxpayers would, in our view, be unduly burdened. In fact, because H.R. 4249 provides that the Federal Government is responsible for absorbing all costs it would seem that the legislation may even invite state courts to impose unreasonably frequent visitation where protected witnesses are involved. We feel that there should be some statutory "cap" on visitation to avoid excessive demands upon limited federal resources.

Second, we are deeply concerned over the provision of H.R. 4249 which establishes a special victim compensation program for persons aggrieved by the acts of protected witnesses. As you know, this Administration is the first to endorse federal victim compensation legislation. The proposed victim compensation bill submitted to the Congress by the Attorney General approaches the issue of victim compensation on a comprehensive basis. We feel that serious concerns are raised if a special victim compensation program for persons injured by protected witnesses is established in addition to the comprehensive victim compensation program set out in the Administration proposal. Among those concerns are:

(1) Such a dual system creates inequity by providing disparate levels of victim compensation to citizens based upon the identity of the perpetrator;

(2) It creates what we see as a highly unfortunate precedent for other separate victim compensation programs for citizens injured by federal defendants released on bail, probation, or parole; and

(3) It would result in flagrant inefficiency by requiring creation of a special bureaucracy to administer a program intended to benefit only a very small number of citizens.

Again, we urge Congress to act on the Administration supported comprehensive victim compensation program and to refrain from creating what we believe is a misconceived program directed to victims of offenses by protected witnesses.

Third, proposed Sec. 3521 (b)(1)(F) requires the Attorney General to "provide relevant information to [State and local] officials concerning a criminal investigation or proceeding related to the person protected." We presently furnish such information but in a manner designed to protect the safety of program participants. We assume that the Committee does not intend the disclosure of the fact of a person's participation in the Witness Security Program whenever he or she is the subject of a routine traffic stop, yet the wording of H.R. 4249 seems to imply just such a result. As the intricacies of responding to requests for criminal history information are better addressed in a briefing than in this letter, we will merely raise this concern and offer to dispatch representatives of the Department to pursue the matter further with you or your staff. Suffice it to say that we consider this to be a serious problem with H.R. 4249.

Finally, your letter raised questions concerning our estimate of the cost of arranging for visitation pursuant to State court child custody orders. In this regard, we do not, at this time, have a historical record relative to the amount of funds expended for child visitations. The cost estimates provided to the Congressional Budget Office (CBO) are based on standard Marshals Service expenses incurred in producing a witness with a security detail. The figures provided are for an average security detail of five inspectors. The level of security, i.e., the number of inspectors required, might vary from case to case, being greater in some instances and fewer in others. It is necessary, however, to have at least one inspector with the Program child and one inspector with the Program parent at all times throughout the visit. (It is also necessary for the minor Program child to be accompanied by a parent from the relocation area as the Marshals Service cannot take custody of the child. The Program parent is generally not present during the child's visit with the non-Program parent.) Our estimate assumes that there would be only one child visiting one non-Program parent only once a month for a two-day period. The provisions of H.R. 4249 allow for modification to the original visitation order, but require that any change be substantially equivalent to the original order. Consequently, the location of the visit might vary for reasons of security, but the frequency of visits could not be altered. It is, therefore, not unlikely that the estimated costs would be significantly higher as the number of visits increases. Also, it is not at all uncommon for there to be several children, all of different parents. Again, this factor would greatly impact on the cost estimate. Enclosed is a detailed breakdown of our visitation cost estimate.

We hope that the comments set out above together with the enclosed June 21 report to Chairman Kastenmeier will be helpful in evaluating our concerns with H.R. 4249. It is our hope that an acceptable compromise can be developed which will enable us to endorse witness security legislation and we stand ready to work with you and your staff toward that end.

Sincerely,

Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 21, 1984

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties, and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At the request of your staff, I am writing to furnish the Department of Justice's views with respect to the witness protection provisions of H.R. 4249, which passed the House on May 22, 1984. As you know, the Senate also included provisions dealing with the witness protection program in Part F of Title XII of S. 1762, which passed the Senate on February 2, 1984.

Legislation treating the witness protection program deals with a very difficult subject area. Many competing interests must be weighed and balances must be struck. The Senate and House bills differ significantly, reflecting divergent compromises and perspectives being brought to bear on a variety of issues. Neither bill is ideal from the Department of Justice's viewpoint. Each embodies significant changes from the proposal sent by the President to the Congress as part of the Comprehensive Crime Control Act of 1983 (S. 829 and H.R. 2151). In general, however, we believe that the Senate-passed bill affords greater flexibility for the witness protection program and, in our judgment, would permit a fairer and more efficient operation of this very important program. As you know, the witness protection program affects greatly our ability, and the ability of the States, to conduct successfully many criminal prosecutions and other proceedings.

I will not attempt to discuss all of the differences between the Senate and House bills, but do here set forth a few areas of major concern.1/

1/ We were advised by your staff that there is no need to reiterate or elaborate with respect to our view that reasonable limitations need to be placed on the government's financial obligations associated with child custody and visitation under H.R. 4249.

Of critical importance are the threshold requirements for providing the various kinds of protection authorized by the program. H.R. 4249 is narrower than current law or the Senate bill in this respect and places severe restrictions on the scope of the program. We believe that these restrictions are inappropriate. For example, the Senate bill would allow the United States to protect a witness in any "official proceeding concerning an organized criminal activity or other serious offense." In contrast, H.R. 4249 would permit the program to be utilized only with respect to a witness "in a criminal judicial proceeding." While the great majority of protected witness situations have involved witnesses in criminal proceedings, the Department of Justice has also used the program to protect witnesses in certain civil cases (e.g., involving the Black Panthers) and in nonjudicial forums such as before a Congressional committee or a Presidential commission. We believe that these uses have been appropriate and beneficial. For instance, it is not difficult to conceive that a Committee of Congress might desire to call a witness whose life would be in danger from his appearance and who would otherwise meet the qualifications for inclusion in the witness protection program. As drafted, H.R. 4249 would not allow the United States to protect a person called as a witness in these situations. Moreover, depending upon an interpretation of the phrase "criminal judicial proceeding," H.R. 4249 might even be construed to preclude application to a witness, facing a threat of reprisal, before a federal or state grand jury investigating criminal activity. We strongly believe that the scope of the witness protection program should be broad enough to encompass all of these circumstances, and that H.R. 4249 needs to be amended to permit this result.

Turning to the criteria for assessing a person's application for entry into the program, the Senate bill requires only one basic determination: the Attorney General or his designee must assess the seriousness of the investigation or case in which the applicant's information or testimony has been or will be provided, and the possible risk of danger to persons and property in the community where the applicant is to be relocated, and must conclude that the need for such protection outweighs the risk of danger to the public. H.R. 4249 requires that a similar finding be made, but, as a result of an amendment added in full Committee, contains a further provision that bars the furnishing of protection to a person "if providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated." We believe this is an improper condition to place upon the government's decision to accept a person into the witness protection program. This condition exalts the admittedly substantial interest in preserving the non-applicant parent's ties with the child of the applicant above the interest in preserving the applicant's very life. In our view, a proper solution lies midway between the Senate and House bills. We agree that consideration of the impact of entry of a parent into the program upon his or her minor children

is appropriate in determining whether to accept a person into the witness protection program but this should be set forth only as a relevant factor, not as an absolute condition, to the granting of an application. Other considerations may outweigh this factor.

Both H.R. 4249 and the Senate bill are drafted to include a further inflexible limitation that, in each case, the Attorney General's determination whether to accept a person into the program be made "[b]efore providing protection" to such person. This is not, however, always practicable. Cases have arisen and likely will arise in which harm to a witness or potential witness is imminent. In such cases failure to provide immediate protection would seriously jeopardize an ongoing investigation or trial. We believe a provision should be added allowing emergency assistance and provisional entry into the program in these situations, until such time as the Attorney General has an opportunity to make the regular determinations called for under the bills.

H.R. 4249 contains a provision that would allow delegation by the Attorney General of responsibilities for administering the witness protection program only to certain high-level officials of the Department "and to one other officer or employee of the Department." The Senate bill contains no limitation on the Attorney General's ability to delegate responsibility for this program. In our view, the provisions of H.R. 4249 would create an excessive burden on high ranking Department of Justice officials. While the bill's permission for a delegation to "one other" officer or employee mitigates this problem to some extent, nevertheless the task of administering the program is extremely time-consuming. In the absence of the "one other" designated individual, that burden would have to be shouldered by one of the high ranking officials enumerated in the bill. Although we agree that certain decisions associated with administering the program, such as the initial decision whether to accept an applicant into the program or determining where the applicant is to be relocated, may have important societal consequences, that is not equally true of the day-to-day determinations involved in the program's management. We urge that the limitations on delegation of authority in H.R. 4249 be relaxed to permit a more practical accommodation of the Department's scarce top-level managerial resources. At a minimum the restrictions should be limited to the initial placement decision.

We have a similar concern with the provision in H.R. 4249 that would require a procedure to be devised within the Department of Justice for filing and resolving grievances regarding the administration of the program by persons therein. Such a procedure must be independent of the program providing protection, must assure the right to a hearing before an official not involved in the case. By comparison the Senate bill requires merely that the Attorney General establish guidelines and procedures for the resolution of complaints

of persons provided protection. Presently, complaints or grievances of persons entering the program are resolved, in the first instance, by the United States Marshals Service and thereafter by the Criminal Division's Office of Enforcement Operations. Both these entities are involved in the administration of the program and are familiar with the types of issues that may arise. In our view, resolution of grievances under the existing system is operating satisfactorily and in recent years has not been a cause of major criticism concerning the program. H.R. 4249 would mandate the creation of a new layer of bureaucracy within the Department devoted to resolution of complaints by program participants and, beyond this, would require the opportunity for a hearing in each case even if the issue were one on which the facts were not in dispute. We believe these requirements are excessive and would require the unnecessary expenditure of considerable monies to achieve implementation.

On another matter, both the House and Senate bills, in enumerating the kinds of assistance that may be provided to a protected witness, fail to include a catch-all provision specifically allowing the government to furnish "other services necessary to assist the person in becoming self-sustaining." We strongly urge the inclusion of such catch-all language. The witness protection program currently provides many more services than are delineated in the bills, such as medical treatment, mail forwarding, and other social services. Since the prefatory language in both bills contemplates that the Attorney General may take any action to assure the protected person's "health, safety, and welfare," the bills should make clear that the list of types of services that may be provided is only illustrative and not exclusive.

While, at staff's request, we have refrained from commenting on most aspects of the child custody provisions in H.R. 4249, we believe the provisions of subsection 3524(d)(5), relating to contempt proceedings for violation by a protected person of a court order with respect to custody or visitation, should be improved. In our view following entry of an order of contempt, the bill should afford a sixty-day maximum period in the discretion of the Attorney General for the person to comply with the court order and thereby purge the contempt. In addition, H.R. 4249 states that the Attorney General shall "terminate protection" to a protected person held in contempt. We have no difficulty with this requirement in concept but believe clarification is needed as to the meaning of "terminate protection." In our view, this should mean that the government will disclose the new identity and address of the protected person to the other parent, as well as end any financial assistance to the protected person unless otherwise directed by the Court. Finally, we believe that the United States should be given the statutory right to recover the litigation costs from the protected person including attorneys' fees, associated with enforcing custody and visitation orders. In our experience, some protected persons are able to bear

all or some of these costs. In such cases, the United States should be able to seek reimbursement from the protected person for the monies expended in legal costs incurred by the other parent in seeking vindication of his or her custody or visitation rights. In addition, the provision in 3524(c) which permits the non-protected person to recover any legal costs from the United States should be more narrowly confined to costs which are both reasonable and which are associated with specific, subsequently brought enforcement actions. The proposed language is unnecessarily vague and permits abuse.

I hope these views have been helpful. The Department of Justice supports the concept of legislation to provide a firm and adequate statutory base for the continued operation of the witness protection program. I understand that Deputy Assistant Attorney General Knapp has previously furnished your staff with suggested language changes, addressed to H.R. 4249, to solve some of the problems discussed in this letter. We look forward to working further with the Subcommittee on this matter and stand ready to provide any additional assistance which may be desired.2/

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

2/ Although we have confined this letter to the witness protection aspects of H.R. 4249, we wish to call your attention to an apparently inadvertent error in proposed 28 U.S.C. 568, which as drafted would prohibit all officials of the Marshals Service from practicing law. Current 28 U.S.C. 575, which we assume was meant to be perpetuated, prohibits only marshals and deputy marshals from practicing law (not, e.g., legal counsel employed by the Marshals Service).

VISITATION COSTS

Estimate of security detail with 5 Witness Security Specialists commencing at noon Friday and ending at noon Monday (visit actually conducted Friday evening through Sunday afternoon).

USMS Costs

Inspector regular hours (40 hrs x $13.47)	$538.80
Inspector OT hours (104 hrs. x $16.10)	$1,674.40
Inspector per diem (4 Insp. x 3 days @ $75)	$900.00
Inspector travel (4 Insp. x $400 avg)	$1,600.00
Mileage (700 miles @ $.20)	$140.00
Commandposts (1 nights x $75)	$75.00
(2 days x $75)	$150.00
Subtotal	$5,078.20

WITNESS and CHILD COSTS

Travel (1 adult ticket and 1 child ticket)	$600.00
Subsistence ($57 x 3 days)	$171.00
Hotel ($70 x 2 days)	$140.00
Subtotal	$911.00

NON-PROGRAM PARENT

Travel	$400.00
Subsistence ($30 x 2 days)	$60.00
Hotel ($70 x 1 day)	$70.00
Subtotal	$530.00

TOTAL	$6,519.20
TOTAL x 12 months	$78,230.40

APPENDIX 3

J. F. GRINER BUILDING

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

AFFILIATED WITH THE AFL-CIO

KENNETH T. BLAYLOCK, NATIONAL PRESIDENT
JOHN N. STURDIVANT, EXECUTIVE VICE PRESIDENT
NICHOLAS J. NOLAN, NATIONAL SEC. TREAS.

1325 MASSACHUSETTS AVE., N.W. · WASHINGTON, D. C. 20005
Telephone: (202) 737-8700

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES
JUSTICE FRATERNITY PROGRESS
AFFILIATED WITH AFL-CIO

IN REPLY PLEASE REFER TO

6e/Cong.

April 25, 1984

The Honorable Robert Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration
of Justice, Committee on the Judiciary
U.S. House of Representatives
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to call to your attention our vigorous objection to a provision in H.R.4249, the United States Marshals Service and Witness Security Reform Act of 1983.

Section 561 (d) of Chapter 37, designates as excepted service all positions in the U. S. Marshals Service appointed by the Attorney General. As the exclusive representative of these employees, we believe that, other than the single U.S. Marshal appointed in each district, all U.S. Marshals Service positions should remain in the competitive service, with the same collective bargaining rights and job protections as other career employees.

The competitive civil service system was designed over a century ago to ensure that Federal employees would be free from undue political pressure, and to provide the government with a stable and experienced workforce. Because of their importance to the security of our nation, this principle has always been applied to Federal law enforcement agencies, including the FBI, Federal prison guards and others.

I understand that discusssions have been held with members of the subcommittee staff and that they are in agreement that deleting this section will in no way undermine the intent of the bill. We thank you for your cooperation in this matter.

Sincerely,

Ken T. Blaylock

Kenneth T. Blaylock
National President

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

October 14, 1983

Honorable Robert W. Kastenmeier
Chairman, House Judiciary Subcommittee
on Courts, Civil Liberties and the
Administration of Justice
House of Representatives
Washington, DC 20515

Dear Chairman Kastenmeier:

We have been contacted by your staff and asked to comment on certain issues arising from the markup of H.R. 3086, specifically the provisions of Section 3522 in the document entitled 'Amendment in the Nature of a Substitute to H.R. 3086' pertaining to the supervision and revocation of certain state offenders in the Federal Witness Protection Program.

First, I concur both with the position of the Marshal's service (that supervision of these very difficult cases is essential) and with that of the Probation Service (that for supervision to be effective, the only workable solution is to transfer at least limited jurisdiction to modify or revoke supervision to a federal authority).

Second, Section 3522, which would transfer the authority to modify or revoke probation or parole for such cases to the U.S. Parole Commission, as if such cases were federal parolees, appears to provide a logical solution from an operational perspective. The Parole Commission and Probation Service currently work together to provide such supervision to federal parole and mandatory release cases, and the Parole Commission presently contains a small unit which coordinates this activity. Furthermore, we believe that only a modest increase in Commission resources would be necessary for implementation of these activities. We would be glad to work with your staff on providing estimates of these costs.

Finally, I have restricted my comments to what may be termed 'operational issues'. I understand the legal questions involving Federal jurisdiction have been examined by your staff. Also, we have suggested several minor clarifications in the proposed language to your staff.

Thank you for soliciting our views. We will be most willing to work with you further on this matter.

Sincerely,

Benjamin F. Baer
Chairman

BFB/PBH/dv

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

B-197739

AUG 17 1983

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the
Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

During the hearing conducted by your subcommittee concerning H.R. 3086 on June 22, 1983, some differences arose between our testimony and the Department of Justice's. The differences related to the Federal Bureau of Investigation (FBI) sharing information in its on-line computer network on a protected witness' criminal history with State and local criminal justice agencies requesting this information. We pursued this question with officials of the FBI to reconcile the differences expressed during the hearings. The FBI has reviewed and concurs with the facts contained in this letter. As requested by your office, this letter details the results of our subsequent work.

In our testimony, we stated that because of security concerns, the Department of Justice has not cross-indexed the criminal arrest records of protected witnesses under their old identities to their new identities in the National Crime Information Center's (NCIC) on-line computer criminal history file. Consequently, a check of the NCIC's criminal history file in the new identity of a protected witness would produce a "no-record" response even if the witness had been arrested under his/her old identity. This concerned us because such responses are very likely to be inaccurate. Over the years the Marshals Service has estimated that 95 percent of the protected witnesses have prior criminal backgrounds.

Contrary to our testimony, the Marshals Service's comments on this matter at the hearing implied that a mechanism existed to ensure that law enforcement officials checking NCIC's criminal history file under the new identity of a protected witness

will receive a correct response concerning the past criminal activities of that witness. The Marshals Service official stated that if a law enforcement agency requested the criminal history of a witness under the new identity, the requestor would not get an on-line response indicating the witness' past record. Rather, the request would be flagged at FBI headquarters, and the FBI would notify the Marshals Service. The Marshals Service would then advise the FBI to respond to the request. All this would occur within 72 hours of the request. The Marshals Service then stated that on-line requests related to traffic violations and misdemeanors by protected witnesses would not be responded to at all.

In an effort to reconcile these differences, we met with representatives of the FBI responsible for operating its various criminal information systems. We discussed the existing procedures for disseminating a protected witness' criminal record. Essentially, there are two ways to determine whether a person has a criminal record. One is to submit through the mail a fingerprint card or name-check request to the FBI's Identification Division. The second is to make an on-line inquiry of the NCIC's criminal history file--the Interstate Identification Index. According to FBI officials these systems work as follows in relation to protected witnesses.

Regarding the first method, the Justice Department has established a mechanism to provide a protected witness' criminal record identified through a fingerprint or name search to a requesting agency. The FBI has placed flags on the fingerprint cards of protected witnesses in its files. When a fingerprint card or name check is matched to a card with a flag, routine processing is halted and the FBI determines the reason for the flag. If the flag relates to a protected witness, the FBI notifies the Marshals Service of the nature of the inquiry (e.g. an arrest, or employment or licensing matter) and the identity of the inquirer. The Marshals Service then has up to 72 hours to advise the FBI whether to respond routinely (mail the criminal record) or whether the record should be personally delivered by an FBI agent who would caution the recipient on the possible dangers to the witness from uncontrolled disclosure. FBI officials told us they always provide the criminal record when a fingerprint or name match is made on a witness. They said it did not matter whether the request related to a misdemeanor or an employment or licensing check. FBI officials emphasized that

the credibility of their criminal information system would be undermined if they did not take this approach.

Regarding the second method--querying the Interstate Identification Index--it is important to understand that there have been recent changes in NCIC's criminal history file. The original file was called the Computerized Criminal History (CCH). The CCH file was a centralized on-line data bank established in November 1971. It contained the criminal records for about 2 million individuals. According to the FBI, the criminal records of protected witnesses were excluded from CCH because of security concerns and the fact that it was well known in the criminal justice community that CCH was a limited and incomplete system.

The Index which replaces CCH is a more decentralized system and presently contains information on about 7 million individuals. Basically, the Index will either refer requestors to State(s) having a criminal record for a queried individual or indicate that the person has a record at the FBI. A follow-up request can be made to the appropriate agency to obtain the records. The Index was established by combining records in the CCH file with those in the FBI's Automated Identification Division System. With limited exceptions (e.g. criminals who are subjects of wanted notices or are under parole/probation supervision and instances involving incorrect fingerprint readings), the latter system contains the criminal records of only those persons whose first arrest was on or after July 1, 1974.

In contrast to the CCH file, the FBI made no effort to purge the criminal records of protected witnesses when establishing the Index. FBI officials said the Index includes the criminal records of about 600 protected witnesses. Although they could provide no estimate, FBI officials told us that most of these 600 records would be retrievable only under a protected witness' old identity. They said that records would be cross-indexed between a witness' old and new identity only if two conditions are met--(1) the witness had been arrested under both his/her old and new identity, and (2) the witness' initial arrest (except as noted in the above paragraph) occurred on or after July 1, 1974. Thus, according to FBI officials, the criminal records of almost all witnesses in the program are presently not retrievable from the Index under their new identities.

B-197739

FBI officials said that inquiries into NCIC criminal histories are coded by purpose and can be related only to one of the following general reasons: administrative, criminal justice, employment or licensing, and review or challenge of a record. Inquiries made for criminal justice purposes cannot be further broken down as to whether they relate to traffic violations, misdemeanors or felonies.

With regard to notifying the Marshals Service, FBI officials told us that all inquiries of the Index for detailed records are recorded to provide an audit trail on system use as required by law (5 U.S.C. 552(c)). The records disseminated are compared daily with the 600 protected witnesses in the Index. If it is determined that information on a protected witness was disseminated through the Index, the FBI informs the Marshals Service within 24 hours. We were not aware of this comparison and notification procedure at the time of the hearing before your subcommittee.

Our discussion with FBI officials largely substantiates the comments we made before your subcommittee. FBI officials stated that except for a few witnesses, they have not cross-indexed the arrest records of protected witnesses from their old identities to their new identities within NCIC's on-line criminal history file. FBI officials related two reasons for this situation. The first concerns the impact such an action could have on program security. The second involves political concerns that cross-indexing would give the FBI the ability to improperly monitor and conduct surveillance over protected witnesses through its criminal information system.

There is an obvious difference in the Department's basic disclosure policy on sharing a protected witness' criminal record through a name and fingerprint search and through NCIC's on-line criminal history file. The importance of this difference is enhanced with the development and continued growth of the Index because it is a more comprehensive, and thus useful, on-line system than CCH. We plan to continue pursuing the desirability of maintaining an incomplete Index with respect to protected witnesses and to determine whether the Department's concerns can be resolved or mitigated as a part of our review for you.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

June 17, 1983

William E. Foley, Director
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. Foley:

I am writing to request the views of the Administrative Office of the United States Courts, particularly the Probation Division, with respect to my bill H.R. 3086. One portion of this legislation requires the Probation Office to supervise persons in the Witness Security Program who are on probation or parole as a result of a state court conviction. This authority is added because currently when persons are placed in the Witness Security Program, they are removed from their place of residence and usually taken to another state. While these transfers are desirable for security purposes, there was no intention to permit the person entering the program to escape from the supervision of a state court sentence.

It appears impractical to resolve this problem by relying on the use of interstate compacts; thus, the most efficient method of maintaining supervision appears to be using the services of Federal probation officers. Assuming this approach is acceptable to the concerned parties, several important questions remain. For example, should such supervision lead to possible revocation using Federal or state standards? Whose budget is going to pay for this increase in supervision responsibility?

The Subcommittee has one day of hearings scheduled on this bill for June 22, 1983. It is possible that we will mark up the bill shortly thereafter. Thus, it would be most helpful to the work of the Subcommittee if your office could provide us with your views on this subject.

Yours very truly,

ROBERT W. KASTENMEIER
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

September 26, 1983

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration
of Justice
Committee on the Judiciary
House of Representatives
2137B Rayburn House Office Building
Washington, D. C. 20515

Dear Chairman Kastenmeier:

I reply to your letter of June 17 concerning your bill, H.R. 3086, the "United States Marshals Service and Witness Security Reform Act of 1983." Section 102 of the bill requires probation officers, upon the request of the Attorney General, to supervise persons in the Witness Security Program who are on probation or parole as a result of a state court conviction. As you request in your letter, we have studied the bill and provide our views below. The Judicial Conference Committee on the Administration of the Probation System considered this bill at the August 1-2, 1983, meeting and concluded that the judiciary should support the legislation as necessary to deal with this serious problem.

From our analysis, the most difficult problem we foresee is that of jurisdiction over the state probationers and parolees. At the heart of the supervision of released offenders is the authority the probation officer has to enforce the conditions of probation or parole. In the Federal system if the officer has a supervision problem, he asks the court or Parole Commission for guidance, further instructions to the offender, or the issuance of a warrant. Under the bill, the probation officers would have to deal with a diversity of jurisdictions, operating under unique rules in each case. Communicating with the variety of jurisdictions involved while operating a national program on a systematic basis, and insuring that violators are brought to justice, would be a monumental task. Bear in mind further that these individuals represent some of the worst risks that come under supervision. We conclude that the only workable solution is for jurisdiction, or at least limited jurisdiction to modify and revoke supervision, to rest with Federal courts for probationers and the U. S. Parole Commission for parolees.

To explore the legal problems, including that of transfer of jurisdiction, our General Counsel's Office has prepared a detailed analysis of Secton 102, and I enclose a copy (Exhibit 1). As you can see the memorandum concludes there is no satisfactory way for the Federal courts to assume jurisdiction of a state case. Notwithstanding that conclusion, I have asked the General Counsel to draft proposed legislative language that

fashions a remedy along the lines of the statutory provisions for transfer of offenders to or from foreign countries (Title 18 U.S.C. 4100 et. seq). Similar procedures for parole cases would also have to be adopted, and I am directing a copy of this letter to the Chairman of the U. S. Parole Commission, who is aware of our recommendation. I recommend that you consult with him concerning these issues.

Another matter which came to our attention in your bill was that of Section 564(b) which provides authorization for the U. S. Marshals Service to pay salaries, etc., of U. S. Court personnel. Such disbursement authority was transferred to the district court clerks pursuant to 28 U.S.C. Section 604(a)(8), which permits the Director of the Administrative Office to "disburse directly or through the several United States marshals, monies appropriated for the maintenance and operation of the courts." Thus, it is my view that Section 564(b) is no longer necessary.

You also asked whose budget is going to pay for this increase in supervision responsibility. The majority of the expenses would be funded under the general authority for appropriations for the operation of the Federal Probation System. Depending on the number of extra cases involved, there would probably need to be increases in staff of both the Probation Division of the Administrative Office of the United States Courts and the U. S. Parole Commission, which provide a variety of special coordination services for protected witness probationers and parolees respectively. I have no view as to whether the states should be billed for this service.

We have asked the U. S. Marshal's Service and the Department of Justice to determine the number of state probationers and parolees who would require supervision and estimate the increases in those numbers for 1984 and 1985. As soon as we receive that information it will be forwarded to your subcommittee.

Thank you for soliciting our views. My staff is most willing to work with you further if you need their assistance.

Sincerely,

William E. Foley
Director

cc: Benjamin F. Baer, Chairman
U. S. Parole Commission

Judge Gerald B. Tjoflat, Chairman
Judicial Conference Committee on the
Administration of the Probation System

UNITED STATES GOVERNMENT

memorandum

DATE: July 15, 1983

REPLY TO ATTN OF: William M. Nichols
General Counsel

SUBJECT: H.R. 3086

TO: William A. Cohan, Jr.
Chief, Probation Division

You have asked for comments on H.R. 3086, which would, among other things, provide certain protections for government witnesses in criminal proceedings. In particular, you have requested our views on section 102 of that bill, which would permit a United States probation officer to supervise any person who is provided protection under the provisions of the bill and who is on probation or parole under state law.

It is our understanding that at the present time there is no statutory authority for the supervision by United States probation officers of state probationers or parolees in the Witness Protection Program (Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933-934) and that states are unwilling to permit participation in the program by such probationers and parolees because of that lack of supervision. We are also aware that the provisions of the Uniform Act for Out-of-State Parolee Supervision compact, in force in most states, were not drafted for and are inadequate to provide the secrecy necessary for a witness protection program. Accordingly, we agree that a procedure whereby United States probation officers supervise relocated state probationers and parolees would be the most feasible solution to the problem. Supervision of such persons, we believe, is constitutionally feasible. It is our opinion, however, that it is not possible to transfer or otherwise invest full jurisdiction over such persons in the courts of the United States.

CONSTITUTIONALITY OF FEDERAL SUPERVISION

It is clear, first of all, that there is no constitutional problem inherent in the transfer of state probationers and parolees from state to federal supervision. While there are, of course, no judicial determinations of the constitutionality of such a transfer, analogous procedures have been approved by the courts. The Uniform Act for Out-of-State Parolee Supervision, for example, authorizes the governor of a state to enter into a compact with any

other state by which either state may supervise parolees or probationers convicted and sentenced in the other state. The compact obliges the receiving state to assume the duties of visitation and supervision and provides for the retaking of parolees and probationers by the sending state. To that end, the compact permits the sending state to enter the receiving state and retake the parolee or probationer without formal extradition proceedings.

The compact, which has been entered into by most of the states and territories, has survived a number of constitutional challenges. In In re Tenner, 128 P.2d 338 (Cal. 1942), for example, a parolee from Washington, who was arrested in California under the provisions of the compact, claimed that his retaking was unconstitutional on several grounds. First, he argued that the compact was repugnant to the terms of art. IV, § 2, cl. 2 of the United States Constitution, providing for the extradition of fugitives from justice. The California Supreme Court noted that the Constitution does indeed provide for extradition and that federal legislation had implemented the constitutional provision (18 U.S.C. § 3182). The court concluded, however, that "[n]either the terms of the constitutional provision nor the act of Congress making it effective indicate that the extradition procedure was intended to be exclusive." (128 P.2d at 343.)

The petitioner also argued that his retaking by Washington officials deprived him of his liberty without due process in violation of the Fourteenth Amendment. The California Supreme Court also rejected this argument, stating that petitioner "had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary."

Finally, the court rejected the argument that the compact is contrary to the provisions of art. 1, § 10, cl. 3 of the Constitution, which provides that no state shall enter into an agreement or compact with another state without the consent of Congress. Congress, the court noted, has given such consent. See 4 U.S.C. § 112 (formerly 18 U.S.C. § 420).

Other states have also sustained the compact. See e.g. Gulley v. Apple, 210 S.W.2d 514 (Ark. 1948); Pierce v. Smith, 195 P.2d 112 (Wash. 1948); and Stone v. Robinson, 69 So.2d 206 (Miss. 1954).

These cases lend support to the view that, although there is no direct constitutional authority for interstate cooperation in crime prevention, such cooperation is not

barred by the constitution. That view received further support in New York v. O'Neill, 359 U.S. 1 (1958). The case involved the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. That law permits a court in a state that has passed the Act to transmit to another state that has passe' the Act a certificate indicating that a person residing in the receiving state is needed as a witness in the requesting state. Upon receipt by the receiving state, a hearing is held to determine whether the certificate will be honored. If honored, a summons is issued directing the witness to attend and testify in the requesting state.

The Supreme Court of Florida had held that there was no constitutional provision that would permit the Florida courts to act to benefit another state. The Supreme Court rejected this rationale:

> These extra-constitutional arrangements are designed to solve problems created by a constitutional division of powers without disturbance of the federal nature of our government . . . .
>
> The manifold arrangements by which the Federal and State Governments collaborate constitute an extensive network of cooperative governmental activities not formulated in the Constitution but not offensive to any of its provisions or prohibitions (359 U.S. at 10-11).

One of these collaborative arrangements between the state and federal governments is the housing of prisoners. Section 5003 of title 18, United States Code, gives the Attorney General the authority to contract with a state or territory for the housing of state prisoners in federal institutions. Pursuant to such contract, a person committed to the Attorney General is subject to "all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed and unless specifically provided for in the contract."

That statute has been upheld against challenges that it usurps power expressly reserved to the states and that it is beyond the power of the federal government. Duncan v. Madigan, 278 F.2d 695 (9th Cir. 1960), cert. denied 366 U.S. 919, reh. denied 366 U.S. 947 (1961), cert. denied 368 U.S. 905 (1961). And see United States ex rel Gereau v. Henderson, 526 F.2d 889, 894 (5th Cir. 1976) where, in upholding the statute, the court stated:

> Federalism does not preclude cooperative action between the two sovereigns when the interests of both state and nation are thereby served.

It is also clear that a transfer from state to federal custody under section 5003 does not result in a violation of due process, regardless of any added inconvenience to the prisoner in serving his sentence in an institution other than one pertaining to the sovereign that sentenced him. In Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haymes, 427 U.S. 236 (1976), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not entitle a duly convicted state prisoner to a hearing prior to an intra-state transfer. The initial decision to assign a prisoner to a particular institution, the court reasoned, is not subject to review under the Due Process Clause. The conviction of the defendant sufficiently extinguished defendant's liberty interest to empower the state to confine him in any of its institutions. The administrative transfer, therefore, from one such institution to another does not give rise to any rights of due process.

The same rationale applies to transfers from state to federal institutions. See Sisbarro v. Warden, Mass. State Penitentiary, 592 F.2d 1 (1st Cir. 1979); Dozier v. Hilton, 507 F. Supp. 1299 (D.N.J. 1981); and Fletcher v. Warden, 467 F. Supp. 777 (D.Kan. 1979).

The Supreme Court has lent support to this view in its holding, in Howe v. Smith, 452 U.S. 473 (1981), that the Attorney General has broad authority under 18 U.S.C. § 5003 to arrange with states to house state prisoners in federal facilities. Howe involved a prisoner originally committed to a state prison in Vermont. In 1974, Vermont decided to close its only maximum security prison. In anticipation of that closing, Vermont entered into an agreement with the Attorney General pursuant to section 5003 to house up to 40 Vermont prisoners in federal facilities. The petitioner was one of the prisoners transferred under that agreement.

The court rejected the contention that section 5003 only permits such a transfer when a particularized need for "treatment" of the transferee is demonstrated. The court held that section 5003 was passed simply to permit the federal government to receive state prisoners just as the states had long been able to accept federal prisoners in state institutions under 18 U.S.C. § 4002. Although the court did not specifically rule on the constitutionality of section 5003, it is unlikely that, in light of Howe, any question of its constitutionality remains.

Pursuant to these authorities, we are convinced that there is no constitutional difficulty inherent in permitting United States probation officers to supervise state probationers and parolees, especially when the transfer of supervision is consensual, as it must be under the provisions of the witness protection program. It is clear, we believe, that the Attorney General may enter into such an arrangement with the states. It is also clear that, once convicted, a person may be transferred by the state for the service of his sentence. We do not believe that it makes any meaningful difference whether the service of that sentence is under confinement or under unconfined supervision. Nor do we think it is significant that the supervision is provided by a judicial branch employee as opposed to an executive branch employee. Supervision of a non-federal probationer or parolee would be, essentially, a non-judicial function. It is not uncommon for non-judge judicial branch personnel to be assigned non-judicial functions.

FEDERAL JURISDICTION

Although we believe that a transfer of supervisory authority is constitutional, we do not think that it is possible to transfer complete jurisdiction over the probationer or parolee to the United States. And there are a number of practical problems not dealt with in H.R. 3086, that can only be satisfactorily resolved by the transfer of such jurisdiction.

The bill as written would result in the state's retaining jurisdiction over the probationer or parolee with the United States probation officer supervising only. But what rules would govern such supervision? How could new conditions be imposed? What authority would the probation officer exercise? What would be the consequences of a violation of probation or parole? By what authority could a probationer cause the arrest of a person under his supervision? Who would conduct revocation proceedings and under what rules? Would the state contact necessitated by the continuance of state jurisdiction endanger the secrecy of the witness protection program?

These problems would be most firmly resolved by the assumption of federal jurisdiction over the probationer or parolee. The assumption of such jurisdiction would sever contacts with the state, thus promoting the security of the witness. It would give the probation officer more creditability with the person being supervised; the probation officer would be the one initiating any revocation proceedings if that were necessary. The probationer or parolee

would be subject to the same rules as others under the supervision of the probation officer. Any revocation would result in confinement in federal facilities.

Unfortunately, however, this arrangement runs afoul of the United States Constitution. Art. III, § 2, cl. 1 of the United States Constitution commits the judicial power of the United States only to those cases arising under the Constitution, and the laws and treaties of the United States and to certain controversies. There is no criminal law federal jurisdiction other than those laws duly passed by Congress. In other words, there is no common law of federal crime in the United States. See United States v. Hudson, 211 U.S. (7 Cranch) 32 (1812). A person is, therefore, not subject to the "criminal" jurisdiction of the federal courts unless his action is prohibited by statute. "[O]ne may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of the Act of Congress." Donnelley v. United States, 276 U.S. 505, 511 (1928). The court in Donnelley noted, interestingly, that the National Prohibition Act was passed because state prohibition laws were not being enforced and the federal government was, of course, powerless to enforce them.

Jurisdiction over a person convicted of a crime continues over that person until his sentence is completed. That is why the federal courts retain jurisdiction over the federal probationers supervised by the United States probation officers. In constitutional terms, there is a "case" until a person has completed the sentence imposed by the court for the statutorily created offense against the United States. See Ponzi v. Fessenden, 258 U.S. 254 (1922).

Even under the treaties for the transfer of criminal prisoners and their implementing legislation (18 U.S.C. §§ 3244, 4100-4115) the sovereign under which the conviction was had does not lose its power to keep a convict in custody by turning the convict over to another sovereign for the execution of sentence. Indeed, the treaties specifically provide that jurisdiction over the terms of the sentence remains in the transferring state. 18 U.S.C. § 3244. In Tavarez v. United States Attorney General, 668 F.2d 805 (5th Cir. 1982), the court held that the United States retained the power to hold in custody a person convicted in the United States, released to Mexico, and present again in the United States after his escape from a Mexican prison.

We should point out, however, that 18 U.S.C. § 4104 would appear to provide the United States Courts with substantive powers over a foreign probationer. Full jurisdiction is not transferred by virtue of section 3244, noted above, but the court has power to change conditions, and revoke probation as if it were the sentencing court. We have found no cases that interpret this provision and the legislative history is virtually silent as to its constitutionality. The primary concern of the drafters of the legislation and of the cases interpreting the statutes has been the possible violation of the rights of United States citizens in the foreign courts. The conclusion of the drafters and of some of the cases has been simply that the treaties and their implementing legislation were designed to alleviate hardships rather than impose penalties. See 1977 U.S. Cong. and Adm. News, 3146, 3150. While this conclusion may reflect an expectation that there will be few challenges by persons benefitting from the legislation, we do not believe that it establishes a basis for jurisdiction.

We also believe that these provisions are different from any statutes that would provide for similar exchanges between the states and the federal government. First, they involve the treaty power of the United States. The Constitution specifically provides that the United States Courts have the power to interpret treaties. There is, however, authority for the proposition that even under the power of the court to interpret treaties, there must be a "case or controversy" for it to do so. See Z. & F. Assets Realization Corp. v. Hall, 114 F.2d 464 (D.C. Cir. 1940), aff'd. 311 U.S. 470 (1941).

Second, it would simply be impractical for the United States probation officers to go to the court of the sentencing country every time a change in a probationer's status was proposed. But, of course, under the witness protection program, such a procedure would be equally impractical.

In short, while we are not dissuaded from our belief that jurisdiction over a state probationer or parolee may not be conferred on a United States district court, the treaties discussed above do not necessarily confirm or refute that conclusion.

Nor do we believe that there is any other basis by which such jurisdiction can be conferred. Judicial power under the Constitution is limited to the "right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Muskrat v. United States, 219 U.S. 346, 361-362 (1911). A state probationer or parolee has violated no federal law, nor does he have an actual controversy capable of resolution by the court, nor is

there another litigant disputing any claim, nor has he been injured by any action of the state or federal government that is cognizable by a court. There is simply no way that the judicial power of the United States can extend to impose jurisdiction over a person convicted of a state offense simply because the Attorney General wishes to use that person as a witness, unless, of course, the person offends the authority of the court by refusing to honor a subpoena or some like action.

Indeed, the attempt to impose such jurisdiction by statute would not only offend the case or controversy requirement of art. III, § 2, cl. 1, but would likewise violate the separation of powers embodied in the Constitution. In effect, a statute permitting the transfer of jurisdiction over a state probationer or parolee constitutes a grant by the legislative branch to the executive branch of the power to deliver to the judicial branch for the exercise of its judicial power a person who has neither offended the laws of the legislative branch, the actions of the executive branch, nor the authority of the judicial branch.

In Hayburn's case, 2 U.S. (2 Dall) 409 (1792), the Supreme Court was asked to issue a mandamus directed to the circuit court commanding that court to proceed in a petition by Mr. Hayburn to be put on a federal pension. The act creating that pension purported to assign to the circuit court judges the duty to administer the pension. The Supreme Court refused to act on the petition, but agreed to hold the matter under advisement. It became moot. Because of the important nature of the case, the reporter noted the reasoning of the lower courts on the question. The principle concern was, simply, that what the act asked the courts to do was not a judicial function. And, as indicated, by Chief Justice Jay of the Circuit Court for the District of New York:

> That by the Constitution of the United States, the government is divided into three distinct and independent branches, and it is the duty of each to abstain from, and to oppose, encroachments on either.
>
> That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner. (Quoted with approval in Muskrat v. United States, supra at 352.)

In our view an attempt to bestow upon the United States Courts this kind of duty is precisely the kind of action that the separation of powers and the case and controversy provision were designed by the Framers to prevent. Whereas this conferral of jurisdiction is beneficent to all parties, the potential for the abuse of such a conferral is manifest.

Thus, we believe that it would not be constitutionally permissible to attempt to create in or transfer to the United States Courts jurisdiction over state probationers and parolees.

In support of this conclusion, we note that the various arrangements by which certain sovereigns have entrusted the supervision of their convicts' sentences to other sovereigns do not purport to confer jurisdiction. The courts have held, for example, that 18 U.S.C. § 5003 does not confer jurisdiction on federal authorities when a state prisoner is housed in a federal facility. See Battista v. Kenton, 312 F.2d 167 (2nd Cir. 1963) and Duncan v. State of Maine, 295 F.2d 528 (1st Cir. 1961). Likewise, the transfer of probation supervision to another state under a compact similar to the Uniform Act for Out-of-State Parolee Supervision has been held not to transfer jurisdiction over a parolee to the receiving state. Pate v. Wilson, 348 F.2d 900 (9th Cir. 1965).

Unquestionably, a state may temporarily relinquish jurisdiction over a defendant. This happens frequently when one sovereign, under the doctrine of comity, relinquishes its jurisdiction to another for trial, sentencing and incarceration. But that other sovereign has its own basis of jurisdiction in those cases: the defendant has violated the laws of both sovereigns. See United States v. Warren, 610 F.2d 680 (9th Cir. 1980). This procedure does not provide support for the proposition that the United States may accept complete jurisdiction over a state prisoner without some independent basis for jurisdiction. Accordingly, as indicated above, it is our view that a transfer of jurisdiction is not possible.

EXHIBIT II

Section 1. Transfer of Offenders on State Probation in Federal Witness Security

(a) A person provided protection under chapter 224 of title 18, United States Code, who is on probation under State law may be supervised by a Federal probation officer with the consent of the Attorney General. Any person so supervised shall be under Federal jurisdiction during the period of his supervision and shall be subject to all laws of the United States, as appropriate, which pertain to probationers.

(b) Prior to consenting to supervision as provided in subsection (a), the Attorney General shall:

(i) determine that the State having jurisdiction over the probationer consents to the transfer of such individual to Federal supervision,

(ii) obtain from the probationer a signed consent agreement wherein the probationer assents to a transfer to Federal supervision, and

(iii) determine that a United States district court is willing to accept jurisdiction over a state probationer who is transferred to Federal supervision.

(c) Upon the receipt of an offender on probation from State authorities, the Attorney General shall cause the offender to be brought before the United States district court which is

to exercise jurisdiction over the offender. A judge or magistrate of that court shall verify the consent of the offender as provided in Section 3.

(d) If the offender is to reside in the district where the court of jurisdiction is situated, the court shall place the offender under the supervision of a probation officer of the court. If the offender is to reside in another district, the court shall transfer supervision to the appropriate district court, and the transferee court shall place the offender under the supervision of a probation officer of that court.

(e) The offender shall be supervised by a United States probation officer under such conditions as are deemed appropriate by the court of jurisdiction.

(f) Probation may be revoked in accordance with Section 3653 of title 18, United States Code, and Rule 32.1 of the Federal Rules of Criminal Procedure. A violation of the conditions of probation shall constitute grounds for revocation. If probation is revoked, the court may require the offender to serve the sentence originally imposed by the state court, or any lesser sentence. If imposition of sentence was suspended, the court may impose any sentence which might originally have been imposed by the state court.

(g) The provisions of sections 4161; 4162; 4164; 4201 through 4204; 4205(d), (e), and (h); 4206 through 4216; and 4218 of title 18, United States Code, shall be applicable following a revocation of probation.

Section 2. Transfer of Offenders on State Parole in the Federal Witness Security Program

(a) A person provided protection under chapter 224 of this title who is on parole under State law may be supervised by a Federal probation officer with the consent of the Attorney General. Any person so supervised shall be under Federal jurisdiction during the period of supervision and shall be subject to all laws of the United States, as appropriate, which pertain to parolees.

(b) Prior to consenting to supervision as provided in subsection (a), the Attorney General shall:

(i) determine that the State having jurisdiction over the parolee consents to the transfer of such individual to Federal supervision, and

(ii) obtain from the parolee a signed consent agreement wherein the parolee assents to a transfer to Federal supervision.

(c) Upon receipt of an offender who is on parole from State authorities, the Attorney General shall cause the offender t be brought before a United States district court. A judge o

magistrate of the court shall verify the consent of the offender as provided in Section 3. After consent is verified, the Attorney General shall assign the offender to the United States Parole Commission for supervision.

(d) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with reference to a parolee transferred from State supervision pursuant to this section as they have with reference to an offender convicted in a court of the United States. Sections 4201 through 4204; 4205(d), (e), and (h); 4206 through 4216; and 4218 of title 18, United States Code, shall be applicable.

Section 3. Verification of Consent of State Offender to Transfer to Federal Supervision

(a) Prior to the commencement of Federal supervision of a State probationer or parolee who is being provided protection under chapter 224 of title 18, United States Code, the fact that the offender consents to a transfer to Federal supervision and that such consent is voluntary and given with full knowledge of the consequences thereof shall be verified by a United States magistrate, or by a judge of the United States as defined in section 451 of title 28, United States Code.

(b) The verifying officer shall inquire of the offender whether he understands and agrees that his supervision by a Federal probation officer will be subject to the following conditions:

(i) only the State court in which he was convicted can set aside the conviction or modify the original sentence, and any proceedings seeking such action may only be brought in that court;

(ii) supervision while on probation or parole shall be carried out in accordance with the laws of the United States rather than the laws of the State in which the offender was convicted;

(iii) any sentence imposed or executed by a United States district court upon the revocation of probation or parole shall be carried out according to the laws of the United States; and

(iv) his consent to supervision by a Federal probation officer, once verified by the verifying officer, is irrevocable.

(c) The verifying officer, before determining that an offender's consent is voluntary and given with full knowledge of the consequences, shall advise the offender of his right to consult with counsel as provided in Section 4. If the offender wishes to consult with counsel before the

verification proceedings he shall be advised that the proceedings will be continued until he has had an opportunity to consult with counsel.

(d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements, and that the offender accepts Federal supervision subject to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.

(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the records.

Section 4. Right to Counsel, Appointment of Counsel

(a) In proceedings to verify consent of an offender for transfer to Federal supervision pursuant to sections 1 and 2, the offender shall have the right to advice of counsel.

(b) If the offender is financially unable to obtain counsel, counsel for proceedings conducted under section 3 shall be appointed by the verifying officer pursuant to such

regulations as may be prescribed by the Director of the Administrative Office of the United States Courts. The Administrative Office of the United States Courts shall make payments of fees and expenses of the appointed counsel in amounts approved by the verifying officer, which shall not exceed the amounts authorized under the Criminal Justice Act (18 U.S.C. § 3006(a)) for representation in a misdemeanor case. Payment in excess of the maximum amount authorized may be made for extended or complex representation whenever the verifying officer certifies that the amount of the excess payment is necessary to provide fair compensation, and the payment is approved by the chief judge of the United States court of appeals for the appropriate circuit.

Section 5. Execution of Sentence Imposing an Obligation to make Restitution or Reparation

If a parolee or probationer transferred from State supervision pursuant to Section 1 or 2 has been ordered by the State court which imposed sentence to pay a sum of money to the victim of the offense for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to

such proceedings shall be transmitted through the Administrative Office of the United States Courts for distribution to the victim.

Section 6. Definitions

(a) "Offender" means a person who has been convicted of an offense or who has been adjudged to have committed an act of juvenile delinquency;

(b) "parole" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority to its supervision;

(c) "probation" means any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which the suspended penalty of imprisonment may be ordered executed;

(d) "sentence" means the penalty imposed for a judgment of conviction in a criminal case;

(e) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

September 16, 1983

MEMORANDUM TO DAVID BEIER

Subject: Witness Security Program (H.R. 3086)

The Probation Committee has reviewed H.R. 3086 and is filing its views with the Judicial Conference. A formal response incorporating the Conference's views will follow immediately after the Conference's meeting next week.

For your background, the Committee is concerned about the jurisdictional concerns raised in the enclosed memorandum from our General Counsel. The Committee does believe that there should be Federal authority for modification or revocation of the terms of supervision if Federal probation officers become involved in such cases.

In addition, the Probation Division of this agency is seeking from the U.S. Marshals Service a detailed estimate as to the number of witnesses that could be involved in order to develop a projection of the impact this legislation would have on the Federal Probation Service.

Finally, the General Counsel's Office of this agency has prepared a brief memorandum explaining the desirability of a technical amendment as to the U.S. Marshals Service's authority to make disbursements on behalf of the courts.

Daniel R. Cavan

STATES GOVERNMENT

memorandum

DATE: July 15, 1983

REPLY TO ATTN OF: David N. Adair, Jr.
Office of the General Counsel

SUBJECT: H.R. 3086

TO: William M. Nichols
General Counsel

I have prepared a separate memorandum to Mr. Cohan for your signature on the witness protection aspects of H.R. 3086. Another section of that bill amends chapter 37 of title 28, United States Code, which deals with the United States Marshals' Service.

Mr. Macklin pointed out to me that section 564(b) of title 28, as it would be enacted by this bill, would continue to provide authority for the United States Marshals' Service to pay salaries, office expenses, etc. of judges and other court personnel. As you know, the United States Marshals' Service used to perform this function, but no longer does so. The Judicial Conference of the United States at its September, 1977 meeting approved a procedure whereby the district court clerks' offices would assume the duties of monetary disbursement. The Conference noted that the United States marshals had been serving in the capacity of disbursement officers as a carry-over from the days before the establishment of an independent Administrative Office, when such court administration functions had been centralized in the Department of Justice.

Such disbursement authority was transferred to the district court clerks pursuant to 28 U.S.C. § 604(a)(8), which permits the Director of the Administrative Office to "[d]isburse, directly or through the several United States marshals, monies appropriated for the maintenance and operation of the courts."

Accordingly, Mr. Kastenmeier's committee should be advised that proposed 28 U.S.C. § 564(b) is outmoded and no longer necessary.

Enclosure

cc: Mr. James E. Macklin, Jr.
Mr. William A. Cohan, Jr.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

CHILDREN'S RIGHTS PROJECT

132 West 43 Street
New York, NY 10036
(212) 944 9800

Marcia Robinson Lowry
DIRECTOR

Michael B. Mushlin
ASSOCIATE DIRECTOR

George Kannar
Lauren C. Anderson
STAFF COUNSEL

Susan Kayser
LEGAL ASSISTANT

Norman Dorsen
PRESIDENT
ACLU FOUNDATION

Ira Glasser
EXECUTIVE DIRECTOR
ACLU FOUNDATION

October 19, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Re: H. R. 3086

Dear Mr. Chairman:

At the invitation of your subcommittee staff, I am writing to offer some comments concerning the child custody provisions of H. R. 3086, "The United States Marshals Service and Witness Security Reform Act of 1983," which I understand is scheduled for mark-up later this week. My comments derive both from my general professional experience, as staff attorney to the Children's Rights Project of the American Civil Liberties Union, and, more specifically, from my experiences as counsel for the plaintiff parents in the two leading cases dealing with child custody problems arising from the Witness Protection Program, Ruffalo v. Civiletti, 702 F. 2d. 710 (8th Cir. 1983) and Franz v. United States, 707 F. 2d 582, opinions continued, 712 F. 2d 1428 (D. C. Cir. 1983).

Because my comments on H. R. 3086 may appear to be somewhat negative, I wish to begin by making clear my sincere appreciation for the attention and concern your committee and its staff have paid to this long-neglected problem. There are probably few losses one can experience that are more painful than separation from one's children. And there are few outrages in our society greater than the Program's continuing pattern and practice of unilaterally breaking up American families without notice or hearing simply to serve "purposes of state." One expects to hear about that sort of thing in Argentina, El Salvador or Chile. But for the last fifteen years--despite numerous contrary government assurances to this Committee and to others--it has also routinely "happened here."

While no one at the ACLU disputes for a moment the importance of the government's efforts to eradicate organized crime, elemental human rights should not be casually disregarded along the way. The Committee's efforts to redress the egregious disregard for basic human rights hitherto demonstrated by the Program deserves the admiration and respect of us all.

Having said all that, however, I must also tell you candidly that the present version of H. R. 3086, if enacted, might very well lead to a diminution of the legal rights that a parent affected by the Program presently enjoys. Moreover, certain of the bill's provisions raise serious due process questions and, in my opinion, could well be held unconstitutional by the courts.

The following are what I see as the major problems with the bill.

1. The bill fails to include the effect of relocation upon parent-child relationships as one of the factors the Attorney General must consider in deciding whether to afford protection at all. Our society (not to mention our law) holds the right of parents and children to enjoy a relationship free from government intrusion as highly as any right we have. Consequently, the Attorney General should not be allowed to separate these considerations from his crime-fighting responsibilities in deciding whether to relocate a witness. He simply should not be allowed to relocate children, and significantly interfere with the most important relationships in their lives just because he thinks it will help fight crime. At a minimum, therefore, he should be required to determine, in writing, that the relocation of a witness' dependents will not unduly impair normal family relationships between relocated children and unrelocated parents.

2. By focusing exclusively on "court orders," the bill fails to protect significant numbers of affected parents. For one reason or another, it happens very frequently that divorced or separated parents will not have formal custody/visitation orders entered concerning their children. This has even been alleged in the Franz case. Both the "sworn statement" and "arbitration" provisions of H. R. 3086 focus exclusively on situations where formal orders exist. Given the great diversity and considerable informality in the ways in which our

society deals with visitation and custody, this focus on court orders will define a very significant number of parents out of the bill's coverage altogether. Moreover, the exclusion of parents lacking court decrees is almost certainly unconstitutional. As is evident from the Courts' decisions in Ruffalo and Franz, parents' rights to know and be with their children are derived from natural, not positive, law, and they are guaranteed Constitutional protection whether or not they have been specifically embodied in a court decree. An amendment making clear that the bill applies to all parents, with or without formal court orders, is absolutely essential for the bill to be constitutional or to address the relocation problem with any chance for success.

3. The "arbitration" provisions do not guarantee a parent procedural due process and do not specify who is to pay for the attorneys' fees. The arbitration proceeding contemplated by H.R. 3086 is fundamentally unfair for a number of different reasons.

A. Arbitrator not impartial. By allowing the Attorney General (who must already have decided he wants the witness' testimony for the provision even to be invoked) to choose the arbitrator, a parent is denied the right to an impartial tribunal. The structure established by H.R. 3086 presupposes that the relocation will go through and only attempts to "accommodate" the unrelocated parent's interests to this unilaterally-altered fact. Innocent parents who are left behind are entitled to more than to be faced with a fait accompli.

B. Procedures. As I understand it, the AAA rules, which the arbitrator is supposed to use, do not require application of the rules of evidence or provide for discovery. In a litigated arbitration, the Attorney General will almost certainly put forward hearsay evidence from confidential sources. Application of the hearsay rule could make a great difference to a parent.

C. Substantive Standard. Somewhat astonishingly, the bill sets no substantive standard whatsoever to guide the arbitrator's decision. Thus, a parent cannot possibly know what s/he needs to prove or whether his/her evidence was relied upon, or whether the hearing was meaningful. In an area as constitutionally significant as parent-child relations, this is a glaring deficiency, a statute that is what the Supreme Court calls "perfectly vague."

D. Attorneys Fees. While the bill states that the Attorney General is responsible for "costs" surrounding the arbitration, it does not specify who bears the expense of attorneys fees. The Justice Department currently pays not only the expenses of government counsel in Witness Protection Program custody fights, but also all attorneys' fees and other costs incurred by the protected individual. Thus, to date, unrelocated parents seeking access to their children have had to bankrupt themselves (or obtain pro bono counsel) to bring proceedings while the protected witness (usually a multi-offense felon) gets a completely free ride. To be fair, the bill must assure that when the government intervenes in family matters, the assistance given to the private persons affected is fair and equal. At present, it is neither; and the bill does not clearly rectify the current, extremely unfair, situation.

4. The judicial review and modification provisions are inadequate and unconstitutional. The most serious constitutional problems I see with the current bill arise subsequent to the contemplated arbitration. First, it strikes me as a serious due process denial to prevent appeal of the arbitrator's decision to an independent court. It is simply unacceptable to have an arbitrator "finally" decide such delicate issues involving fundamental constitutional rights. Second, the provision allowing the Attorney General to modify custody determinations in a manner adverse to unrelocated parents on his own determination that they have "violated" the arbitrator's ruling is a gross deprivation of due process which effectively vitiates the whole arbitration process. Third, the notion that judicial review is only obtainable in Washington, D. C., is unjustifiably burdensome on the bewildered parents throughout the country who will be affected by the Program, and stands in shocking contrast to the bill's considerably more liberal venue provisions regarding judgment creditors, whose interests are far less significant constitutionally than those of parents seeking to maintain a relationship with their children. Finally, the requirement that, if a relocated parent refuses to comply with the arbitrator and the Attorney General does not remedy the situation, the unrelocated parent must prove the Attorney General wrong by an "arbitrary and capricious" standard simply misreads the relevant Constitutional law. Under Santosky v. Kramer, 455 U. S. 745 1982), it is clear that in cases involving government infringement of parental rights, due process requires

(1) that the government have the burden of proof, and (2) that its burden must be met, not just by preponderance, but by evidence that is "clear and convincing." The present bill completely reverses these burdens and is, in my opinion, highly vulnerable to constitutional attack. These provisions will operate in practice to deny parents rights that they presently have.

Review of the bill, which is plainly an honorable attempt to deal with a very intricate problem, has only convinced me further of the wisdom of the views expressed by Representative Frank at the hearing on this legislation and by Judge Bork in his concurring opinion in the Franz matter. See 712 F.2d at 1434 et. seq. In addressing this matter, Congress must do one of two things: it must either decide to require the Justice Department to conform with state court orders (at least in cases where they exist) or it must write a detailed federal domestic relations code which does not limit or abridge the procedural rights parents ordinarily enjoy in state court. H. R. 3086 indicates an intention to "federalize" domestic relations issues, but does so in an incomplete way. I am afraid that, at present, the bill would establish a biased hearing, without procedural due process, without a right to appeal, without any articulated standard, whose results are in any event subject to unilateral modification by someone who has to foot the bill for the results of the arbitrator's decision, and subject to outright rejection by the other parent, reviewable only under an "arbitrary and capricious" standard.*

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*This last characterization is, obviously, based upon the assumption that the Attorney General will not ordinarily disclose information regarding the relocated parent's whereabouts if the parent fails to comply with the arbitrator's decision. (I should note, incidentally, that I cannot understand why the bill would authorize release of this information in cases involving debts, but only "withdrawal of protection" in child custody cases.) My skepticism on this score can easily be tested, however. The government has maintained that it has had a policy of making such disclosures since at least mid-1982. The Committee is in an excellent position to determine whether any such "discretionary" disclosures have actually been made.

I hope you will understand that these comments, which may sound a little harsh, are offered in a good-faith effort to assist the Committee in confronting a serious conflict between two competing worthy causes. It is my position that the rights of American citizens to enjoy their relationships with their children--to know them, teach them, and watch them grow--must, if there is an intractable conflict, take precedence over the government's perfectly understandable desire to have a particular witness's testimony. I do not see how we can function as a decent society otherwise. But I also think the apparent conflict between these two worthy causes may ultimately only be an illusion. The goal of the prosecutions is to keep the peace and "preserve the domestic tranquility." Breaking up families is no way to achieve that goal.

Please do not hesitate to contact me for clarification or elaboration of any points I raise herein, or if I can be of further assistance to the Committee in any other way.

Sincerely yours,

George Kannar

George Kannar
Staff Counsel

GK:mlc

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

600 Pennsylvania Ave., SE
Suite 301
Washington, DC 20003
(202) 544 1681

John Shattuck
DIRECTOR

Jerry J. Berman
David E. Landau
Wade J. Henderson
Muriel Morsey
LEGISLATIVE COUNSEL

Hilda Thomson
ADMINISTRATIVE DIRECTOR

Julie A. Steiner
FIELD COORDINATOR

Sally Berman
NEWSLETTER EDITOR

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944 9800

Norman Dorsen
[illegible]

Ira Glasser
[illegible]

FEB 27 1984

February 21, 1984

The Honorable Robert W. Kastenmeier
2232 Rayburn House Office Building
Washington, DC 20515

Dear Representative Kastenmeier:

We are writing to congratulate you and your subcommittee staff on the fine work that has gone into producing the most recent draft of the Federal Witness Protection Act, H.R. 4249. If the bill is amended in the Judiciary Committee to reflect these changes the Act will represent a comprehensive, careful, and even-handed solution to an exceptionally disturbing problem. Combating organized crime, and protecting witnesses who will help in doing so, are and obviously should be, high social priorities. Just as obviously, the personal and financial burdens created by that effort should not fall randomly on innocent children and parents. The new draft goes a long way toward insuring that the pursuit of justice does not itself become an occasion of injustice, both by protecting the affected families' substantive rights and by creating procedures for adjusting those rights where there are genuine public and practical needs.

There are a few relatively minor aspects of the current draft which we believe would profit from change, and those changes are really only clarifications. First, while we believe it is implicit in the bill, it might be best to make explicit that absolute termination (as opposed to readjustment) of an unrelocated parent's visitation rights is not available to either the arbitrator [Section 3524(d)(3)] or a court considering a "security"-based government request for modification of an outstanding order [Section 3524(d)4(e)2]. Also, it might be wiser to use some word (or phrase) other than "obligation" (see p.2, l.6; p.6, l.24) to describe the rights of unrelocated parents to a continued relationship with their children. It is clear to us that the bill means to protect parental rights that are not embodied in formal court orders (indeed, Franz v. U.S., 707 F. 2d 582, would seem to compel it to), but the word "obligation" could be read to imply that the bill is limited to parents whose rights are embodied in legally binding document.

Also, we believe it would be appropriate to add a requirement that the notice to an unrelocated parent that a child has entered the program contain a citation to this statute and a brief statement of the procedural protection it affords. Finally, in the portion concerning government responsibility connected with relocation-related litigation, it would be appropriate to mention (perhaps in legislative history) that the word "costs" is not being used in the narrow sense set forth in the Federal Rules (i.e. filing fees, and so forth), but is meant to include other litigation expenses (such as travel, expert witness fees, etc.) as well.

As you can see, these are relatively small and practical suggestions, and in every major feature the present draft is excellent. It has been a pleasure working with your staff on this legislation, and we look forward to following its course from here. Please feel free to contact us if further comment, or other assistance, would in any way be helpful.

Sincerely,

George Kannar
Staff Counsel
Children's Rights Project

John Shattuck
Director
Washington Office

STATEMENT OF ADMINISTRATION POLICY

May 18, 1984
(House)

H.R. 4249 - United States Marshals Service and Witness Security Reform Act of 1983
(Kastenmeier (D) Wisconsin and 11 others)

Although the Administration supports clarifying the statutory authority of the Attorney General with respect to the Witness Security Program of the Department of Justice, it strongly opposes House passage of H.R. 4249 for two reasons. First, the bill's provisions concerning child custody arrangements would be both extremely burdensome and costly to implement. Second, establishment of the special Victims Compensation Fund would discriminate unfairly in favor of persons who are the victims of crimes committed by a particular class of offenders and would cost far more to administer than any benefit that might be derived. In this connection, the Administration strongly supports its own comprehensive victims compensation proposal, which is contained in H.R. 5124. Accordingly, the Administration recommends removal of H.R. 4249 from the suspension calendar, so that it can be amended to delete these objectionable provisions and to make certain other miscellaneous amendments.

3

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Rudolph G. Penner
Director

May 29, 1984

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Congressional Budget Office has reviewed H.R. 4249, the United States Marshals Service and Witness Security Reform Act of 1983, as passed by the House of Representatives, May 22, 1984. We expect that enactment of this legislation would result in costs of $15 million to $30 million annually beginning in fiscal year 1985. No significant additional costs to state or local governments are expected to result from enactment of H.R. 4249.

H.R. 4249 would create a comprehensive statutory charter for the operation of the Witness Security Program, which was originally authorized in the Organized Crime Control Act of 1970. The bill would codify a number of the program's current practices and change certain procedures. It would authorize the appropriation of $2 million annually beginning in 1985 to compensate persons who are victimized by participants in the Witness Security Program. Although not specifically authorized, administrative costs for monitoring, evaluating and disbursing these funds are expected to be about $300,000 annually.

H.R. 4249 would also clarify the rights of minor children affected by the Witness Security Program. It would allow visitation rights in a safe third city under the supervision of the Marshals Service. Court-appointed arbitrators would resolve disputes, if necessary. Based on information from the Marshals Service, annual costs could range from $15 million to $25 million, depending upon the number and locations of families requiring supervised custody visitation rights. If additional appropriations are not provided for this purpose, it is likely that appropriations that would have been used to bring new witnesses into the program would be used instead to pay for these supervised visitation costs. This protection is presently offered by the Marshals Service only as resources allow.

The bill would also establish new procedures for bringing court actions against a protected person in U.S. District Courts. The court would be required to appoint a guardian to act on behalf of the protected witness. The costs and fees incurred in such actions could ultimately be assigned to the federal government, although the extent to which this would occur is not certain. As indicated in a study prepared by the General Accounting Office (GAO/GGD-83-25), the Marshals Service received information about complaints or litigation involving approximately 36 witness cases during a six-month period in 1980. The total owed or allegedly owed by the protected witnesses was over $7 million. If a similar pattern occurs in the future, court costs of approximately $1 million annually would result from these provisions. The portion of the outstanding debt of witnesses that ultimately might be paid by the federal government cannot be estimated.

Title II would change the manner in which U.S. Marshals are appointed. Under current law, U.S. Marshals are appointed by the President and subject to confirmation by the Senate. H.R. 4249 would allow the Attorney General to appoint and supervise U.S. Marshals. It would also eliminate the fixed fee charges for certain processing and servicing activities provided by the Marshals Service. Rather, the fees could be set on a cost recovery basis, resulting in an estimated increase in fees of about $2 million annually. The bill would allow these fees as well as other collections currently being deposited in the general fund of the Treasury to be credited directly to the appropriation account. In addition to the $2 million in processing fees, an estimated $5 million annually in collections would become available to the Marshals Service, subject to appropriation action.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Rudolph G. Penner
Director

cc: Honorable Hamilton Fish, Jr.
Ranking Minority Member

June 6, 1984

Rudolph G. Penner
Director
Congressional Budget Office
U.S. Congress
Washington, D.C. 20515

Dear Mr. Penner:

I am writing in response to your recently submitted cost estimate for H.R. 4249. As you know, the aforementioned bill was reported by the Committee on the Judiciary in early May. At the time the bill was reported the committee staff submitted all available information on the reported bill. At that time, the Committee staff asked to be informed of any preliminary cost figures. This request was agreeable to the CBO staff. Notwithstanding this agreement the CBO estimate has been submitted without any consultation. Ordinarily this problem would be less significant, however, in this case the error is more important. First, the cost estimate is that the child visitation portion of the bill will cost more than the entire witness protection program. Frankly, such an estimate is difficult to fathom. Second, it is my understanding that the sole source of information for this cost estimate is the Department of Justice which is vehemently opposed to the legislation. Thus, it is not surprising that the Department's cost estimate is exaggerated.

In conclusion, due to the inconsistencies in regular CBO procedures and the high likelihood of error in this estimate it would be most helpful for your office to more carefully review these figures. I have written to the Attorney General to inquire about the cost assumptions which were orally presented to CBO. Until this information can be verified it would seem appropriate for you to withdraw your cost estimate.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR:dbl

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Rudolph G. Penner
Director

June 26, 1984

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

In response to your letter of June 6, 1984 regarding the CBO cost estimate for H.R. 4249, members of our staff met with David Beier and Joseph Wolfe of the Courts, Civil Liberties, and Administration of Justice Subcommittee staff. They discussed the specific assumptions used to develop the cost estimate, the key factors that affect the estimate, and the nature of the data available. We have agreed to try to gather further information on the current costs of child visitation and on the extent of participation in the program, and will keep your staff informed regarding our progress. If, based on further review or additional information, it appears that our estimate is not accurate, we will certainly prepare a revised one.

I regret that your staff was not informed of the preliminary cost figures. While this is not our normal procedure, we had agreed to do so in this case, and I apologize for any inconvenience this may have caused you.

We look forward to being of assistance to your Committee in the future.

Sincerely,

Eric Hanushek
for Rudolph G. Penner

cc: Honorable Hamilton Fish, Jr.
Ranking Minority Member

APPENDIX 4

I

98TH CONGRESS
1ST SESSION

H. R. 4249

To amend title 18, United States Code, to provide for the protection of Government witnesses in criminal proceedings, to establish a United States Marshals Service, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 28, 1983

Mr. KASTENMEIER (for himself, Mr. HYDE, Mr. BROOKS, Mr. MAZZOLI, Mr. SYNAR, Mrs. SCHROEDER, Mr. GLICKMAN, Mr. FRANK, Mr. MORRISON of Connecticut, Mr. BERMAN, Mr. DEWINE, and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to provide for the protection of Government witnesses in criminal proceedings, to establish a United States Marshals Service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "United States Marshals Service and Witness Security Reform Act of 1983".

TITLE I—PROTECTION OF GOVERNMENT WITNESSES

AUTHORITIES OF ATTORNEY GENERAL

SEC. 101. Part II of title 18, United States Code, is amended by inserting after chapter 223 the following new chapter:

"CHAPTER 224—PROTECTION OF WITNESSES

"Sec.
"3521. Witness relocation and protection.
"3522. Probationers and parolees.
"3523. Civil judgments.
"3524. Child custody arrangements.
"3525. Victims Compensation Fund.
"3526. Cooperation of other Federal agencies and State governments.
"3527. Additional authority of Attorney General.
"3528. Definition.

"§ 3521. Witness relocation and protection

"(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in a criminal judicial proceeding if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may

also be endangered on account of the participation of the witness in the judicial proceeding.

"(2) The Attorney General shall issue guidelines defining the type of criminal cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

"(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

"(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may—

"(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

"(B) provide housing for the person;

"(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

"(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

"(E) assist the person in obtaining employment; and

"(F) refuse to disclose the identity or location of the person or any other matter concerning that person, except that the Attorney General shall, upon the request of State or local law enforcement officials, provide relevant information to such officials concerning a criminal investigation or proceeding relating to the person protected.

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph (F) of this paragraph.

"(2) Any payment made pursuant to paragraph (1)(D) shall be exempt from income taxation under any Federal, State, or local law. Deductions shall be made from any such

payment to a person to satisfy obligations of that person for family support payments pursuant to a State court order.

"(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(F) shall be fined $5,000 or imprisoned five years, or both.

"(c) Before providing protection to any person under this chapter, the Attorney General shall make a written assessment in each case of the possible risk of danger to other persons and property and shall determine whether the need for that person's testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under this chapter, the Attorney General shall consider the person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person's testimony, results of psychological examinations, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter where the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

"(d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including—

"(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings,

"(B) the agreement of the person not to commit any crime,

"(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter,

"(D) the agreement of the person to comply with civil judgments against that person,

"(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter,

"(F) the agreement of the person to designate another person to act as agent for the service of process,

"(G) the agreement of the person to make a sworn statement of all outstanding legal obligations im-

posed by court order, including obligations concerning child custody and visitation, and

"(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title.

Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include (i) a procedure for filing grievances within the Department of Justice independently of the program providing protection under this chapter, and (ii) an opportunity for a hearing before an official not involved in the case who is designated by the Attorney General or, if the Attorney General is involved in the case, by the next highest ranking officer in the Department of Justice not involved in the case.

"(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of understanding

shall be signed by the Attorney General and the person protected.

"(3) The Attorney General may delegate any responsibilities under this chapter only to the Deputy Attorney General, to an Associate Attorney General, to the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, to the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

"(e) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.

"§ 3522. **Probationers and parolees**

"(a) A probation officer may, upon the request of the Attorney General, supervise any person provided protection under this chapter who is on probation or parole under State law, if the State involved consents to such supervision. Any person so supervised shall be under Federal jurisdiction during the period of his supervision and shall, during that period, be subject to all laws of the United States which pertain to parolees.

"(b) The failure by any person provided protection under this chapter who is supervised under subsection (a) to comply with the memorandum of understanding entered into by that person pursuant to section 3521(d) of this title shall be grounds for the revocation of probation or parole, as the case may be.

"(c) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with respect to a probationer or parolee transferred from State supervision pursuant to this section as they have with respect to an offender convicted in a court of the United States and paroled under chapter 311 of this title. The provisions of sections 4201 through 4204, 4205(d), (e), and (h), 4206 through 4216, and 4218 of this title shall apply following a revocation of probation or parole under this section.

"(d) If a person provided protection under this chapter who is on probation or parole and is supervised under subsec-

tion (a) of this section has been ordered by the State court which imposed sentence on the person to pay a sum of money to the victim of the offense involved for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to such proceedings shall be distributed to the victim.

"§ 3523. Civil judgments

"(a) If a person provided protection under this chapter is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided, process in the civil proceeding may be served upon that person or an agent designated by that person for that purpose. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person, the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the Attor-

ney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person, and upon the request of the person holding the judgment, disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure of the identity and location of the person shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery.

"(b)(1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment (hereinafter in this subsection referred to as the 'petitioner') resides. Such action shall be brought within one hundred and twenty days after the petitioner requested the Attorney General to disclose the identity and location of the protected person. The complaint in such action shall contain statements that the petitioner holds a valid judgment of a Federal or State court against a person provided protection under this

chapter and that the petitioner sought to enforce the judgment by requesting the Attorney General to disclose the identity and location of the protected person.

"(2) The petitioner in an action described in paragraph (1) shall notify the Attorney General of the action at the same time the action is brought. The Attorney General shall appear in the action and shall affirm or deny the statements in the complaint that the person against whom the judgment is allegedly held is provided protection under this chapter and that the petitioner requested the Attorney General to disclose the identity and location of the protected person for the purpose of enforcing the judgment.

"(3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a guardian to act on behalf of the petitioner to enforce the judgment. The clerk of the court shall forthwith furnish the guardian with a copy of the order of appointment. The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties under this subsection.

"(4) It is the duty of the guardian to proceed with all reasonable diligence and dispatch to enforce the rights of the petitioner under the judgment. The guardian shall, however, endeavor to carry out such enforcement duties in a manner that maximizes, to the extent practicable, the safety and security of the protected person. In no event shall the guardian disclose the new identity or location of the protected person without the permission of the Attorney General, except that such disclosure may be made to a Federal or State court in order to enforce the judgment. Any good faith disclosure made by the guardian in the performance of his or her duties under this subsection shall not create any civil liability against the United States or any of its officers or employees.

"(5) Upon appointment, the guardian shall have the power to perform any act with respect to the judgment which the petitioner could perform, including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law. The Federal Rules of Civil Procedure shall apply in any action brought under this subsection to enforce a Federal or State court judgment.

"(6) The costs of any action brought under this subsection with respect to a judgment, including any enforcement action described in paragraph (5), and the compensation to be allowed to a guardian appointed in any such action shall be

fixed by the court and shall be apportioned among the parties as follows: the petitioner shall be assessed in the amount the petitioner would have paid to collect on the judgment in an action not arising under the provisions of this subsection; the protected person shall be assessed the costs which are normally charged to debtors in similar actions and any other costs which are incurred as a result of an action brought under this subsection. In the event that the costs and compensation to the guardian are not met by the petitioner or by the protected person, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of the action brought under this subsection.

"(7) No officer or employee of the Department of Justice shall in any way impede the efforts of a guardian appointed under this subsection to enforce the judgment with respect to which the guardian was appointed.

"(c) The provisions of this section shall not apply to a court order to which section 3524 of this title applies.

"§ 3524. Child custody arrangements

"(a) Before protection is provided under this chapter to a person who has obligations with respect to child custody or visitation under a court order the compliance with which is disputed among the parties subject to the order, the Attorney General, acting through the United States Marshals Service,

shall arrange for a proceeding to arbitrate the dispute among the parties subject to the order. Such proceeding shall be presided over by an arbitrator appointed by the Attorney General. In such proceeding the arbitrator shall operate under the rules of the American Arbitration Association. The proceeding shall be conducted before the protection is provided under this chapter, except that in an emergency the proceeding may be conducted as soon as possible after the protection is begun to be provided.

"(b) An arbitration proceeding under subsection (a) shall be held at such place and under such security arrangements as are determined by the Attorney General. Each party to the proceeding is entitled to be represented by an attorney at the proceeding. The parties to the proceeding may present witnesses, if feasible, or if not feasible, the testimony of such witnesses may be presented by affidavit. The arbitrator may appoint experts to assist in making determinations with respect to the proceeding. The Attorney General may present testimony at the proceeding with respect to the security requirements of the person provided protection under this chapter and that person's family.

"(c) After the proceeding, the arbitrator shall settle the dispute among the parties if an agreement cannot be reached among the parties. The decision of the arbitrator shall be final. The parties shall make good faith efforts to change the

terms of the court order that gave rise to the dispute for the purpose of making the order consistent with the decision of the arbitrator.

"(d) The Attorney General shall pay the costs incident to the arbitration proceeding and shall pay for any visitation arrangements made pursuant to the arbitration proceeding.

"(e) If a party other than the person provided protection under this chapter violates the terms of the decision of the arbitrator, that violation shall be the basis for modification of the award by the Attorney General. If the person provided protection under this chapter violates the terms of the decision of the arbitrator, that violation shall be the basis for terminating such protection. If the Attorney General decides not to terminate such protection on the basis of such a violation, a party to the arbitration decision aggrieved by the decision of the Attorney General shall be entitled to a hearing in the United States District Court for the District of Columbia to review that decision. The decision of the Attorney General shall be affirmed unless the court finds that the decision of the Attorney General was arbitrary and capricious. Upon such a finding, the court may enter an order requiring the Attorney General to terminate protection under this chapter to the person involved.

"(f) In any case in which the Attorney General decides not to terminate protection under this chapter even though

the person involved violated the terms of a decision of an arbitrator under this section, the Attorney General shall notify the Congress in writing of the decision and the reasons for the decision.

"§ 3525. Victims Compensation Fund

"(a) The Attorney General may pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person provided protection under this chapter.

"(b) Not later than four months after the end of each fiscal year, the Attorney General shall transmit to the Congress a detailed report on payments made under this section for such year.

"(c) There are authorized to be appropriated for the fiscal year 1985 and for each fiscal year thereafter, $2,000,000 for payments under this section.

"(d) The Attorney General shall establish guidelines and procedures for making payments under this section. The payments to victims under this section shall be made for the types of expenses provided for in section 3579(b) of this title, except that in the case of the death of the victim, an amount not to exceed $50,000 may be paid to the victim's estate. No payment may be made under this section to a victim unless the victim has sought restitution and compensation provided

under Federal or State law or by civil action. Such payments may be made only to the extent the victim, or the victim's estate, has not otherwise received restitution and compensation, including insurance payments, for the crime involved. Payments may be made under this section to victims of crimes occurring on or after the date of the enactment of this chapter. In the case of a crime occurring before the date of the enactment of this chapter, a payment may be made under this section only in the case of the death of the victim, and then only in an amount not exceeding $25,000, and such a payment may be made notwithstanding the requirements of the third sentence of this subsection.

"(e) Nothing in this section shall be construed to create a cause of action against the United States.

"§ 3526. Cooperation of other Federal agencies and State governments; reimbursement of expenses

"(a) Each Federal agency shall cooperate with the Attorney General in carrying out the provisions of this chapter and may provide, on a reimbursable basis, such personnel and services as the Attorney General may request in carrying out those provisions.

"(b) In any case in which a State government requests the Attorney General to provide protection to any person under this chapter—

"(1) the Attorney General may enter into an agreement with that State government in which that government agrees to reimburse the United States for expenses incurred in providing protection to that person under this chapter; and

"(2) the Attorney General shall enter into an agreement with that State government in which that government agrees to cooperate with the Attorney General in carrying out the provisions of this chapter with respect to all persons.

"§ 3527. Additional authority of Attorney General

"The Attorney General may enter into such contracts or other agreements as may be necessary to carry out this chapter. Any such contract or agreement which would result in the United States being obligated to make outlays may be entered into only to the extent and in such amount as may be provided in advance in an appropriation Act.

"§ 3528. Definition

"For purposes of this chapter, the term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.".

CONFORMING AMENDMENT; REPEAL

SEC. 102. (a) The table of chapters for part II of title 18, United States Code, is amended by inserting after the item relating to chapter 223 the following new item:

"224. Protection of witnesses ..... 3521".

(b) Title V of the Organized Crime Control Act of 1970 (84 Stat. 933) is repealed.

TITLE II—UNITED STATES MARSHALS SERVICE AND SERVICE OF PROCESS

ESTABLISHMENT OF UNITED STATES MARSHALS SERVICE AND LIMITATIONS ON SERVICE OF PROCESS BY SUCH SERVICE

SEC. 201. (a) Chapter 37 of title 28, United States Code, is amended to read as follows:

"CHAPTER 37—UNITED STATES MARSHALS SERVICE

"Sec.
"561. United States Marshals Service.
"562. Powers and duties generally; supervision by Attorney General.
"563. Power as sheriff.
"564. Disbursement of salaries and moneys.
"565. Collection of fees; accounting.
"566. Delivery of prisoners to successor.
"567. Delivery of unserved process to successor.
"568. Practice of law prohibited.

"§ 561. United States Marshals Service

"(a) There shall be a United States Marshals Service in the Department of Justice.

"(b) The Attorney General may appoint a Director of the United States Marshals Service, who shall be the head of the Service.

"(c) The Attorney General may appoint such other officials of the United States Marshals Service as the Attorney General considers necessary.

"(d) All positions in the United States Marshals Service appointed by the Attorney General under this section shall be positions in the excepted service, as defined in section 2103 of title 5.

"§ 562. Powers and duties generally; supervision by Attorney General

"(a) The United States Marshals Service shall provide such services to the district courts of the United States, the United States courts of appeal, and the United States Court of International Trade, as the Attorney General directs.

"(b) The Attorney General shall supervise and direct the United States Marshals Service in the performance of public duties and accounting for public moneys. Each official of the United States Marshals Service shall report any official proceedings, receipts, and disbursements and the condition of the office as the Attorney General directs.

"§ 563. Powers as sheriff

"An official of the United States Marshals Service, in executing the laws of the United States within a State, may

exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.

"§ 564. Disbursement of salaries and moneys

"(a) The United States Marshals Service, under regulations prescribed by the Attorney General, shall pay the salaries, office expenses, and travel and per diem allowances of United States attorneys and their assistants, clerks, and messengers, and of the officials of such Service.

"(b) On all disbursements made by the United States Marshals Service for official salaries or expenses, the certificate of the payee is sufficient without verification on oath.

"§ 565. Collection of fees; accounting

"(a) Each official of the United States Marshals Service shall collect, as far as possible, any lawful fees of the office and account for the same as public moneys.

"(b) The official's accounts of fees and costs paid to a witness or juror on certificate of attendance issued as provided by sections 1825 and 1871 of this title may not be reexamined to charge such official for an erroneous payment of the fees or costs.

"§ 566. Delivery of prisoners to successor

"Each official of the United States Marshals Service shall deliver to the successor to such office all prisoners in the custody of that official.

"§ 567. Delivery of unserved process to successor

"All unserved process remaining in the hands of an official of the United States Marshals Service shall be delivered to the successor to such office.

"§ 568. Practice of law prohibited

"An official of the United States Marshals Service may not practice law in any court of the United States or in any State court.".

(b) Any United States marshal serving on the effective date of this title shall continue to serve for the remainder of the term for which such marshal was appointed, unless sooner removed by the Attorney General.

UNITED STATES MARSHALS FEES

SEC. 202. Section 1921 of title 28, United States Code, is amended to read as follows:

"§ 1921. Fees of the United States Marshals Service

"(a)(1) Except as otherwise provided, the United States Marshals Service shall collect, and a court may tax as costs, the fees for the following:

"(A) Serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, capias, or any other writ, order, or process in any case or proceeding.

"(B) Serving a subpena or summons for a witness or appraiser.

"(C) Forwarding any writ, order, or process to another judicial district for service.

"(D) The preparation of any notice of sale, proclamation in admiralty, or other public notice of bill of sale.

"(E) The keeping of attached property (including boats, vessels, or other property attached or libeled), actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate for each official of the United States Marshals Service required for special services, such as guarding, inventorying, and moving.

"(F) Copies of writs or other papers furnished at the request of any party.

"(G) Necessary travel in serving or endeavoring to serve any process, writ, or order, except in the District of Columbia, with mileage to be computed from the place where service is returnable to the place of service or endeavor.

"(2) The United States Marshals Service shall collect, in advance, a deposit to cover the initial expenses for special services required under paragraph (1)(E), and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded. This paragraph ap-

plies to all private litigants, including seamen proceeding pursuant to section 1916 of this title.

"(3) For purposes of paragraph (1)(G), if two or more services or endeavors, or if an endeavor and a service, are made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most remote from the place where service is returnable, adding any additional mileage traveled in serving or endeavoring to serve in behalf of that party. If two or more writs of any kind, required to be served in behalf of the same party on the same person in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected.

"(b) The Attorney General shall prescribe from time to time regulations for the fees to be collected and taxed under subsection (a).

"(c)(1) For seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise and receiving and paying over money, the United States Marshals Service shall collect commissions of 3 per centum of the first $1,000 collected and 1½ per centum on the excess of any sum over $1,000, except that the amount of the commission shall be within the range set by the Attorney General. If the property is not disposed of by sale by such Service, the commission shall be in such

amount, within the range set by the Attorney General, as may be allowed by the court. In any case in which the vessel or other property is sold by a public auctioneer, or by some party other than an official of the United States Marshals Service, the commission authorized under this subsection shall be reduced by the amount paid to such auctioneer or other party. This subsection applies to any judicially ordered sale or execution sale, without regard to whether the judicial order of sale constitutes a seizure or levy within the meaning of State law.

"(2) The Attorney General shall prescribe from time to time regulations which establish a minimum and maximum amount for the commissions collected under paragraph (1).

"(d) The United States Marshals Service may require a deposit to cover any of the fees and expenses prescribed under this section.

"(e) Notwithstanding the provisions of section 3302 of title 31, the United States Marshals Service is authorized, to the extent provided in appropriations Acts, to credit to its appropriation account all fees, commissions, and expenses collected for—

"(1) the service of civil process, including complaints, summonses, subpenas, and similar process; and

"(2) seizures, levies, and sales associated with judicial orders of execution,

by the United States Marshals Service and to use such credited amounts for the purpose of carrying out such activities. Such credited amounts may be carried over from year to year for such purposes.".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 203. (a) Section 872 of title 28, United States Code, is amended to read as follows:

"The Attorney General shall appoint a United States marshal for the Court of International Trade, to whose office the provisions of chapter 37 of this title shall apply.".

(2) The table of sections for chapter 55 of title 28, United States Code, is amended by amending the item relating to section 872 to read as follows:

"872. Marshal.".

(3) The section heading of section 872 of title 28, United States Code, is amended to read as follows:

"§ 872. **Marshal**".

(b) Section 2902 of title 5, United States Code, is amended in subsection (c) by striking out "and marshals".

(c) Section 3053 of title 18, United States Code, is amended by striking out "their deputies" and inserting in lieu thereof "such other officials of the United States Marshals Service as the Attorney General shall designate for purposes of this section".

EFFECTIVE DATE

SEC. 204. This title shall take effect on October 1, 1984.

EFFECTIVE DATE

SEC. 204. This title shall take effect on October 1, 1984.

United States Court of Appeals for the District of Columbia Circuit

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No. 81-2369

WILLIAM FRANZ, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(D.C. Civil Action No. 81-0173)

Argued October 20, 1982

Opinion for the Court Issued on May 10, 1983

Before: Tamm, Edwards and Bork, *Circuit Judges*

Separate Statement, concurring in part and dissenting in part filed by *Circuit Judge Bork*

Filed June 15, 1983

(To be printed at a later date)

No. 81-2369—*Wm. Franz, et al.* v. *USA, et al.*

BORK, *Circuit Judge, concurring in part and dissenting in part:* I agree that the judgment must be reversed. The complaint states a claim for relief and should not have been dismissed. I can, however, agree to very little else in the majority opinion. The majority has passed by the threshold legal issue in this case in order to create a new constitutional right and invent a new procedure to protect it. The result is not a happy one. The right is dubiously grounded and the procedure protects very little. In my view of this case, we are a long way from having to deal with the issues the majority reaches for.

I.

The Organized Crime Control Act of 1970 created the Witness Protection Program. Under the program, the testimony of witnesses against participants in organized crime is obtained by the promise of relocation to protect witnesses and their families from reprisal. Complete secrecy concerning the whereabouts and new identities of the relocated persons is essential. So far as appears, neither Congress nor the Executive foresaw or grappled with the problems created when relocation sunders family ties and breaches rights created by state law. Such cases have begun to surface. This may be one. William Franz, who brings this action on behalf of his children and himself, married Catherine Mary Franz. The couple had three children but later separated and, still later, divorced. Catherine, who had custody of the children, began to live with, and may have married, Charles Allen. Allen, apparently a contract killer for organized crime figures, agreed to testify in a federal criminal trial if he, Catherine, and the three children were admitted to the Witness Protection Program. The government met Allen's condition, and William Franz has been unable to find his children since. Through this litigation, he seeks to vindicate the right to visit them.

The legal and factual background against which this action must be judged is less than clear. This case has gone forward on the assumption that that in February, 1974, after the separation but before the divorce, a Pennsylvania court gave William

visitation rights with respect to the children and gave Catherine custody, if she did not already have it. It is suggested in this court, however, that William may not have been awarded visitation rights, and no record of a visitation order has been found. We do not know whether, if there was no visitation order, William would nevertheless have visitation rights under Pennsylvania law, assuming that law to be controlling. We do not know what defenses Pennsylvania law provides Catherine in an action brought by William to enforce his visitation rights. Nor do we know whether persons (such as the defendants here) violate state law when they assist the custodial parent in defeating the visitation rights of the other parent. *See* Novinson, *Post-Divorce Visitation: Untying the Triangular Knot,* 1983 U. Ill. L. Rev. 121; Campbell, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings,* 1983 U. Ill. L. Rev. 229, 247–56. In fact, given the absence of any decree, we are not even certain that Catherine had legal custody of the children. Moreover, the legislative history of the Witness Protection Program has been so little explored that we do not know whether Congress ever considered the problem of state rights of visitation, and we most certainly have no inkling what impact giving effect to such rights would have on the federal interest in the successful operation of the program. If I am right that answers to these questions are crucial, the short of the matter is that we know almost nothing that we need to know to decide the merits of this case. The case should be remanded so that the district court can determine the answers and proceed accordingly.

II.

Assuming that William Franz and his children have a right under state law to see one another, there is no dobut that that right has been destroyed by Catherine Franz with the assistance of officers of the United States purporting to act under the authority of a statute of the United States. If Pennsylvania law recognizes a tort of interference with visitation rights, or provides some other remedy to William, the question in this case is then simply whether the Organized Crime Control Act shields the United States and the defendant officers of the United States from liability. As the record now stands, I think the Act probably does not. But I stress that further development of the legislative history and of the effect enforcing visitation rights would have upon the Witness Protection Program might change my mind.

Congress, in creating the Witness Protection Program, apparently did not consider whether the federal interest in combatting organized crime required it to displace the interest of the states in regulating family relations. We have been shown no direct evidence of any congressional intent to oust state laws in the area. This is not an end to the matter, however, for it is well-established that federal legislation may oust state law where evidence of such an intent, real or presumed, may be garnered indirectly—from, for example, the pervasiveness of the scheme of federal regulations, the dominance of the federal interest, or the inconsistency of state law with the federal law. *See generally* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Colum. L. Rev. 623 (1975).

It is relevant to this determination that the state laws here in question regulate family relations, a subject that lies at the core of the police powers of the states. As the Supreme Court observed in *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1975), the field of domestic relations "has long been regarded as a virtually exclusive province of the States." Congress has evidenced a similar understanding of the allocation of powers between the nation and the states by generally avoiding direct interference with state regulation of family relationships. So strong has this tradition been that it was long simply a given that federal power could not touch this area of life. Thus, Justice Holmes regarded this as axiomatic in an argument concerning the reach of the commerce clause: "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 402 (1904) (Holmes, J., dissenting).

Today, the commerce power attaches to effects on commerce that are no more direct or substantial than those in Holmes' hypothetical; yet it remains true that family law continues to be regarded as almost entirely a state matter. Whatever current constitutional limits to federal power may be, it is absolutely clear that federal preemption in areas of family law must, at the very least, meet stringent standards to succeed. In *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 581 (1979), the Supreme Court stated:

"Insofar as marriage is within temporal control, the States lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to tne laws of the United States." *In re Burrus,* 136 U.S. 586, 593–594 (1890). Federal courts repeatedly have declined to

assert jurisdiction over divorces that persented no federal question. See, *e.g., Ohio ex rel. Popovici* v. *Agler,* 280 U.S. 379 (1930). On the rare occasion when state family law has come into conflict with a federal statute, this court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. *Wetmore* v. *Markoe,* 196 U.S. 68, 77 (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. *United States* v. *Yazell,* 382 U.S. 341, 352 (1966)."

The majority opinion brushes these constitutional concerns aside with the remark, "Assuming, *arguendo,* that the Attorney General needed such authority to effect the kind of incidental, *de facto* displacement of state law at issue here, he possessed it." Maj. op. at 4 n.5. The authority cited for this is section 501 of the federal statute. Pub. L. No. 91-452, § 501, 84 Stat. 922, 933 (codified at 18 U.S.C. *prec.* § 3481 (1976)). It will not do to shrug off the most fundamental precepts of federalism so casually. The displacement of state law may be incidental to a federal program, but that does not enhance an inference of preemption; indeed, it weakens the inference that it was Congress' purpose to preempt state laws. *See Hines* v. *Davidowitz,* 312 U.S. 52, 70 (1941); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Preemption is more likely to be inferred where the displacement of state law is of central rather than peripheral importance. Nor is it clear why the nullification of law is *de facto* rather than *de jure,* much less why such a characterization makes the nullification constitutionally less suspect. The truth is that a federal officer needs authority to set at naught the legal commands of a state government, and no such authority is explicit in Section 501. That provision states:

"Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity."

That is authority to run the program to proctect witnesses. It cannot be taken as the authority to override state family law that *Hisquierdo* requires. The statute probably does not even create a "mere conflict in works." Most certainly section 501's text does not justify a conclusion that "Congress has 'positively required by direct enactment' that state law be preempted." It is possible that state visitation rights would "do 'major damage' to 'clear and substantial' federal interests," but the government has not urged that in this court and we have no way of knowing. If preemption is to be found, the government should give us the factual basis upon which to rest such a conclusion.

It appears, so far as we are informed, that Congress has not addressed the extent to which, if at all, it wishes to oust state domestic relations law for the greater efficiency of the Witness Protection Program, or considered what accommodations might be possible between the interests thus brought into conflict. Under these circumstances, we should not infer an intent to preempt that may be entirely fictitious.

The district court relied upon *Leonhard* v. *United States,* 633 F.2d 599 (2d Cir. 1980), *cert. denied,* 451 U.S. 908 (1981), in dismissing William Franz's complaint. Though the father there was in a position like William's here (seeking to vindicate both his own and his children's rights) and had state court decrees awarding visitation and then custody, he relied solely, and unsuccessfully, on the due process clause of the fifth amendment. My analysis at this stage of the case rests entirely upon a tentative conclusion that rights assumed to have been given by state law have not been extinguished by Congress. That issue was not present in *Leonhard* and that decision does, not, therefore, justify dismissing the complaint here.

The correct resolution of the issues here is to remand the case for a determination of the state legal rights involved. The district court should determine whether William Franz has a state law right to visit his children whether state law provides a remedy against third parties (here federal officers) who assist in the frustration of that right, whether there are defenses available to those who oppose visitation, defenses such as, perhaps, the safety of the children or the safety of their mother and stepfather. Doubtless, other issues may be presented for legal and factual determination. For example, plaintiffs pleaded a claim under th Administrative Procedure Act, 5 U.S.C. § 706 (1976), which has not been addressed. Because this appeal has somewhat refocussed the issues, had my view prevailed the government would also have been given the opportunity to establish preemption.

It would be premature to specify the details of possible remedies until we know more of the legal and factual terrain on which any remedy must operate. This is

particularly true in light of the difficulties and complications discussed in Section III of this opinion.

It would be inappropriate to speculate now about the constitutionality of the nullification of state visitation law should further evidence require a finding of attempted preemption by the Witness Protection Program or, assuming an attempt to preempt is not inferred, if some presently unpredictable congressional response occurs. Should Congress desire to override some aspects of state domestic relations law in the interests of the program, it will be time enough to decide if there are limits to federal power in this area.

III.

Because the majority opinion takes an altogether different tack from mine and creates new law, it is necessary that I state the reasons why I do not join my colleagues. These reasons have to do with my brethren's unduly expansive discussion of state action, their suggestion that a congressional factual determination may be wrong, the infirmities of their substantive due process analysis, and the difficulties, amounting to impossibilities, with the procedures they find necessary to protect the right they create.

A.

In the view I take of this case, there is no need to ask whether "state action" exists. The majority, because it assumes that the Witness Protection Program makes irrelevant William's rights under state law, must find action by the United States before it can proceed to construct a constitutional right. That there is state action here seems indisputable. Officers of the United States, acting under color of federal law, have removed William's children from their prior residence to a place where William cannot find them, have provided Catherine with the means to keep the children's whereabouts secret, and continue to frustrate William's efforts to locate his children. All this is done in furtherance of a federal program, since, if William could find his children, the protected witness might be less safe and potential witnesses in the future might be unwilling to testify because of the diminished protection the program affords. William's injury, therefore, flows directly from deliberate governmental decisions and actions that inflict the injury for governmental purposes. There seems no question in these circumstances that the complained of injury can be "fairly attributable to the state." *See Lugar* v. *Edmondson Oil Co.*, 102 S. Ct. 2744 (1982). *Compare Rendell-Baker* v. *Kohn*, 102 S. Ct. 2764 (1982).

So plain is that conclusion that there is no need for the proliferation of theories of state action, some with no definable limits to them, in the majority opinion. These theories are unnecessary to decide this case and some of them appear to have worrisome ramifications. I regret that the majority has gone out of its way to endorse them because the expansion of amorphous state action theories results in constitutionalizing more and more aspects of life, thereby increasingly substituting rule by judges for rule by other institutions and by private individuals.

B.

It is not to be doubted by an inferior court that substantive due process is part of our constitutional law. The Supreme Court has made it so, and that must be enough for us. Though the doctrine fell into general disrepute after decisions such as *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897) and *Lochner* v. *New York*, 198 U.S. 45 (1905), it was revived by the Court, with a decidedly different content, in decisions such as *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Roe* v. *Wade*, 410 U.S. 113 (1973). The majority is quite correct in saying that the Court has fashioned both a substantive and procedural constitutional law of family relations in cases such as *Quilloin* v. *Walcott*, 434 U.S. 246 (1978). *See also* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983).

To recognize this is one thing; to go further than the Supreme Court ever has and create for a non-custodial parent a new substantive right to visit his or her children is quite another. The majority emphasizes that the infringement alleged is not merely a curtailment or disruption of the parent-child relation but its permanent termination. The constitutional right is to continue visits in order to avoid that termination. I cannot agree that the Constitution of its own force establishes any such right for a non-custodial parent.

It is always somewhat difficult to criticize substantive due process decisions with any degree of rigor precisely because they proceed, necessarily, by rather amor-

phous generalizations concerning such matters as tradition, the desirability of cultural heterogeneity, and the like. There is much discussion of that sort in the majority opinion here. I do not disagree with many of the general sentiments expressed, but that does not mean those sentiments add up to a constitutional right.

As ill-defined as the mode of reasoning appropriate to substantive due process is, there are, or ought to be, limits to what a court can accomplish with that type of argument. Since the Constitution itself provides neither textual nor structural guidance to judges embarked upon this chartless sea, it behooves us to be cautious rather than venturesome. I think the majority is unduly bold in what it does here. The Supreme Court has established procedural constitutional protections for various relationships within the family. The Court has never enunciated a substantive right to so tenuous a relationship as visitation by a non-custodial parent. The reason for protecting the family and the institution of marriage is not merely that they are fundamental to our society but that our entire tradition is to encourage, support, and respect them. *See, e.g., Wisconsin* v. *Yoder,* 406 U.S. 205, 232-33 (1972) and *Bellotti* v. *Baird,* 443 U.S. 622, 638-39 (1979) (plurality opinion). *See generally* Hafen, supra, 81 Mich. L. Rev. 463. That connot be said of broken homes and dissolved marriages. Indeed, to throw substantive and not simply procedural constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage and may thus partially contradict the rationale for what the Supreme Court has been doing in this area.

Indeed, the majority takes the usual argument for creating fundamental rights and runs it backwards. Fundamental rights are usually grounded in the existence of a tradition of respect for the cultural institution in question. The majority notes that there is no comparable tradition of respect for the bond between a child and his non-custodial parent. Maj. op. at 34. That would seem a considerable difficulty for fundamental rights analysis. But the majority turns the difficulty to advantage by prophesying a continuing trend toward divorce and hence the increased social importance of the "broken" family. This, the majority declared, is sufficient to permit ignoring the absence of a strong tradition with respect to non-custodial parents. In effect, the majority has created a fundamental right or interest by predicting a tradition that will spring to life in the future. Courts have enough trouble identifying and deriving specific meaning from traditions that are real and have been with us for centuries past without imagining traditions that have yet to exist.

The argument of the majority opinion also rests heavily upon the importance of the emotional bond between the non-custodial parent and the child. No doubt there is usually such a bond and the termination of the relation between the parent and child will cause considerable distress. It would be well, however, if there were some additional analysis indicating how this form of emotional distress differs from others that the majority does not, I assume, wish to make the foundation for additional fundamental rights. Suppose, for example, that a mother brought suit protesting her son's induction into a dangerous branch of the armed services. In such a case, there would be at least a temporary and quite possibly a permanent severance of the relation. Moreover, there would be in that case, as there is not in this, a strong tradition of respect for the relationship. And, since the majority mentions the promotion of cultural heterogeneity as a factor to be promoted, it may be noted that the armed services tend to foster cultural homogeneity. Though the majority emphasizes the narrowness of its reasoning, see, e.g., maj. op. at 38, it does so merely by assertion; it does not identify any limiting principles that would prevent its reasoning from being applied to situations like the one just described. The majority's reasoning, in short, lacks rigor and, on its own terms, could produce quite surprising results.

The decisive argument against judicial creation of a substantive constitutional right of a non-custodial parent to visit his or her children is that it is likely to make many state law denials of a right of visitation, or of custody, subject to federal constitutional challenge—a challenge based not upon the need for adequate procedures but upon some federal substantive standard. The majority states that its principle is limited to cases of permanent severance of the relation between parent and child, but it is doubtful that the underlying rationale permits the principle so to be confined. The rationale is the protection of the emotional bond between parent and child. A temporary severance of significant length is likely in many cases to destroy the emotional bond. Thus, on the majority's rationale, a denial of visitation rights or of custodial rights, if it lasted a significant period of time, should fall within their principle of constitutional protection. Once this substantive right is in place, a state will have to muster a "compelling need" whenever it wishes significantly to deny visitation rights or custody to one parent. The major component of the necessary showing would be, one assumes, the "best interests of the child." Such determina-

tions would be subject to constitutional challenges in federal courts and so we would come to have a constitutional law of what constitutes the best interests of the child. This entire body of state domestic relations law would be federalized. It would be difficult to imagine a subject less appropriate for constitutional law and the federal judiciary.

C.

Also troubling is the majority's willingness to enter upon the topic of the propensity of organized crime leaders to eliminate potential witnesses and to retaliate against those who have already testified. Although the majority states that it declines to speculate because of the paucity of relevant evidence in the record and the inconclusiveness of data available from other sources, it does conclude that the matter is in sufficient doubt that "the assessment of the relative strength of the government's interest and the parent's and children's rights will be a difficult task for the body that must ultimately undertake it." Maj. op. at 46. This clearly indicates that some undefined "body" may decide that the evidence of organized crime's propensity to kill potential and actual witnesses is too weak to justify ending the newly constitutionalized visitation rights of a non-custodial parent. If that "body" is Congress, I have no problem with the suggestion. But, since the observation is made in connection with a discussion of the compelling interest that must be shown to overcome a "fundamental liberty interest," it appears that the majority is suggesting that a court or some other arbiter may decide that Congress has insufficient evidence about organized crime to make the choice. If so, the suggestion is extraordinary. Congress has already decided that persons engaged in organized crime kill witnesses. That is an entirely reasonable judgement and it is conclusive upon us and upon any other tribunal that may become involved in this area.

D.

The majority's reasoning is weakest when it prescribes a hearing "to work out some accommodation of the rights of the children and the parent left behind." Maj. op. at 52. Initially, I wish to show that this "hearing" cannot accomplish the results the majority intends and is wholly inadequate to the grave issues the majority says must be reconciled. But I do not rest upon that point, since it would be possible to devise a better hearing, though that, too, would face difficulties so grave that an appellate court, working with a record as devoid of information as the one we have here, ought not to take the lead in devising the necessary procedures. That task should, at least in the first instance, be undertaken by Congress or the Executive. With the record made, the problems and possible solutions explicated, judicial review could apply constitutional values to a real rather than a hypothetical set of procedures.

The hearing the majority has devised is to be held within the three-day period between a decision to admit an informant to the Witness Protection Program and the execution of that decision by the Marshals Service. It is to be secret, because secrecy is essential to the safety of everyone involved. It is to be informal and is to stress "negotiation and accommodation" between the custodial and non-custodial parents as well, one assumes, as among these and the informant, whose life is at stake, and the children. It is also to determine whether, in the particular case, the government has shown that its compelling interest outweighs the conssitutional right of the non-custodial parent to visitations with the children. We are told that the government is to make a particularized showing of advantage in the specific case, maj. op. at 47, which seems to mean a showing that "the testimony of an informant is essential to the prosecution of an important leader of organized crime and that the interests of a non-custodial parent and members of the informant's household cannot be accommodated without risking human life." Maj. op. at 44 (emphasis in original).[1] This means the government will have to lay out its case against the organized crime leader and show both the figure's importance and the necessity of the informant's testimony. It will also have to show the absence of any effective alternative that is less restrictive of visitation rights. The majority concedes that judicial review of the decision made will be virtually impossible. In short, the hear-

[1] It should be noted that the majority has, without explanation, imposed three major additional limits on a statute that itself requires only that the person be a witness or potential witness in "legal proceedings against any person alleged to have participated in an organized criminal activity." The statute does not require that the witness' testimony be "essential," that the legal proceeding be a "criminal prosecution," or that the proceeding be against an "important leader" of organized crime.

ing is to be hasty, secret, informal, and unreviewable, but nonetheless charged with the determination of what the majority conceives to be the most fundamental human rights. it does not sound promising.

Some problems are created because the majority has confined its prescribed hearing to the three-day period between the decision to admit the witness to the program and the execution of that decision by the Marshals Service. This hearing apparently will consist of two proceedings that, because of the time constraint, will often have to go forward simultaneously. One will be the attempt to negotiate a compromise secure enough to guarantee the relocating family's safety and open enough to allow the non-relocating parent a good chance of maintaining his bonds with his children. As I will discuss below, the relocating family is likely to think, with some justification, that any visitation rights, certainly any rights to visit frequently enough to sustain the emotional bond that the majority seeks to protect, will be unacceptably dangerous. The non-custodial parent, on the other hand, is likely to insist on the maximum amount of visitation, or at least the amount he could get, or has already gotten, from a divorce court. Nor is that parent likely to agree to fly to a series of changing locations around the country in order to enhance security. If the emotional bond is the crux of the matter, he will want the children brought to his home so that the visit can take place in an atmosphere conducive to the maintenance of that bond. Aside from the objective differences in the parties' real interests, it must be remembered that the separated parents are unlikely to be friends eager to accommodate one another and that the subject matter of this meeting will be emotionally highly divisive. If that were not enough to preclude compromise, the non-custodial parent will simultaneously be engaged in adversarial proceeding with the government, a proceeding in which the relocating family will be ranged on the government's side. The prospects for agreement would be dim at best, but they are made worse by the setting and the time constraints on the proceedings.

Some of this could be cured. There is no reason to accept as unalterable the present administrative practices of the Marshals Service. If the hearing were placed in an absolutely secure setting, such as a military base, the non-custodial parent could be given adequate notice and the hearing itself could take as long as required. But even then the hearing would be unlikely to produce the conciliation that the majority hopes will make the problem go away. Moreover, though the difficulties of the adversarial process would be mitigated by advance notice and a lengthier hearing, they would remain substantial and perhaps fatal to the purposes the majority hopes to serve. Supposedly, the non-custodial parent is to be given the opportunity to challenge the government's showing that some third person not present is a leader of organized crime and that he can be convicted only if the informant testifies. The government can hardly be expected to make public its case against the leader of organized crime in advance of his prosecution and to explain what the witness will testify to and why a conviction is impossible without that testimony. Every hearing of the sort mandated would impose a significant risk that all of that information would become public.

On the other side, the non-custodial parent, even assisted by able counsel, would have an enormously difficult task in meeting the government's case. Presumably, he will have no way of showing that the absent person is not a leader of organized crime. He will have no way of rebutting a showing that the witness' testimony is essential. To do these things, the non-custodial parent would have to engage in extensive prehearing discovery into the workings of organized crime and would have to be able to summon his own witnesses and cross-examine the government's witnesses. These are rights he can hardly be accorded and would not have the resources to pursue in any event. The non-custodial parent is placed in a position of having to conduct a defense of the absent person the government wishes to prosecute to show his unimportance as well as a prosecution to show the witness is unnecessary. This is all highly unrealistic. The government's showing of a compelling interest will usually go virtually uncontested. That will be true regardless of the amount of notice given or the length of the hearing. Without the right to discovery, without the right to summon witnesses, without the right to effective cross-examination, without anything we believe the ordinary litigant absolutely requires, the non-custodial parent, even with the ablest counsel, will usually be helpless. His only contribution will be to lend legitimacy to the process by his presence.

There are many things we are not told about the hearing the majority requires—the official, if any, who is to preside, the need for counsel, the standard of proof the government must meet, the level of inquiry into the non-custodial parent's fitness and trustworthiness, and the rules of procedure that will govern. The one thing we may be sure of is that the hearing will not be adequate to make a fair and accurate assessment of the issues the majority would entrust to it.

The problem is greater than this, however. It may be that the issues necessarily involved in the situtaion we are confronting simply do not lend themselves to judicialization or to a solution that satisfactorily balances the interests necessarily in conflict. I will try to suggest the problems that may lead to that conclusion, though I do so very tentatively because I know much too little to make any confident statements about this subject.

The focus of any hearing, as the majority notes, must be whether the non-custodial parent's visitation rights are to be terminated or given effect through meetings arranged by the Marshals Service. The primary issue will be the safety with which such meetings can be arranged. Counsel for the government has stated to us that the Marshals Service can arrange such meetings safely. I am unwilling to give dispositive weight to that concession without greater consideration of the practicalities than is possible on the record before us. For one thing, I am not sure that, with respect to people already in the program, we should accept the statement of the Marshals Service as conclusive if the people whose lives are at stake disagree. We do not know why Catherine has refused to allow visits to be arranged. Beyond that, and taking into account other cases as well as this one, there seems to me good reason to be skeptical about the Service's statement that it can conduct adequate visitations safely.

It is reasonable to believe that leaders of organized crime will be assiduous in their efforts to find witnesses hidden by the Witness Protection Program. Aside from ordinary motives of vengeance, leaders of organized crime surely have strong and continuing "business incentive" to kill former witnesses or members of their families even years after the testimony has been given. The success of such reprisals would demonstrate to potential future informers that the Witness Protection Program is not a safe harbor for turncoats.

Where safety from the vengeance of organized crime is the issue, as it must be if the federal interest is to be served, a central concern must be the character and trustworthiness of the non-custodial parent. The hearing officer must of course determine whether the non-custodial parent is motivated—perhaps because of vindictiveness or perhaps because he is assisting leaders of organized crime—by a desire to make the location of the informant known. That motivation is by no means impossible. One district court has found in a case like this that a parent's effort to find her children was a "vehicle of intended homicide." *Ruffalo* v. *Civiletti*, —— F. Supp. —— (W.D. Mo. 1983). Non-custodial parents whose estranged spouses take up with organized crime figures are more likely than a random sample of all non-custodial parents themselves to have some connection or acquaintance with organized crime. The hearing officer will often have grave difficulty in estimating the real motivations of non-custodial parents.

But the problems are grave even when the non-custodial parent's motives are entirely pure, as usually they will be. If the parent should learn or allow himself to learn the location of his former wife from the children, he may be subject to bribery, coercion, or other pressure from criminals bent on reprisal. He may inadvertently let slip that location or the fact that he knows it. Making reliable judgments about a person's ability to avoid learning what he should not know and to maintain silence about what he knows is obviously an almost impossible task. If the arbiter, whoever he or she may be, makes a mistake about the character or motives of the non-custodial parent and grants visitation rights that should have been withheld, the results may well be the death of the relocated family members.

Problems of a different sort may be imagined. As noted, a non-custodial parent who is truly interested in maintaining an emotional bond to his children will require frequent visits and will want them at his home, not a hotel in some distant city or a room at some airport. Thus, to take a plausible hypothetical, the non-custodial father may seek and be granted weekly or monthly visits at his home. If these are to continue for, say, ten years, the cost will be enormous, though that is not my main point. Instead, what must be recognized is that 520 to 120 visits present an enormous security problem. The Marshals Service will have to make sure that the father does not learn the location of the relocated family, as he well might from small children, or, if he should learn the location that he, too, is guarded. The Service will also have to ensure that, despite the frequency and hence predictability of the visits, the children are safe from kidnapping.

It may be that I have exaggerated the dangers in the situation; it may also be that I have underestimated them. The point is that I do not know, and that no judge on this court knows. We have at present no basis for making any judgment. I set out my doubts about the hearing prescribed by the majority and their reliance upon counsel's assertion that visits can be safely arranged simply because we are deciding matters of enormous difficulty in the abstract, without full knowledge of what the

problems are or what the government's range of solutions might be. Instead of plunging ahead to devise a procedure that has little chance of being useful, we ought to insist that those with the capacity to gather the relevant information and to provide the resources for a solution address the problem and do so expeditiously.

IV.

This case presents issues of human rights but it does so against a background that is, to put it bluntly, a legal and factual mess. The one thing I am sure of is that the majority has reached issues that are not ripe for resolution and prescribed a remedy that is wholly inadequate to the gravity of the majority's concerns and that may prove a disaster for both the individuals involved and the Witness Protection Program. Had the case been decided on the grounds I urge, and had federal preemption of state domestic relations law not been shown, the situation would have been put squarely where it belongs, in Congress. Congress may well have overlooked the problem of state custody and visitation rights in establishing the Witness Protection Program. If so, Congress should decide whether it really wants to preempt state law in this area and whether it wants to provide procedures to balance the rights of non-custodial parents and the federal interest.

If preemption has occurred, so that state rights of visitation are nullified, and if the majority wishes to stand by its construction of a new constitutional right of visitation, the proper course would be to stop the program until either Congress or the Executive had worked out better procedures, ones more sensitive to the problem, than they have constructed or can construct in the abstract. Meanwhile, the district court should have been instructed to take evidence relating to the problems of a remedy and devised visitation rights for William Franz. If the new substantive constitutional right had not been constructed, William would still have had a liberty interest requiring due process, a right which, if he had no state or federal substantive right, would have been vindicated by a process designed to determine whether the Attorney General, through his delegate, had acted within the ambit of the authority granted by Congress.

Instead, the majority, in a footnote, offhandedly finds federal preemption of state domestic relations laws, and does so without heeding Supreme Court precedent; innovates in creating a new fundamental right out of a tradition that does not exist; casts doubt on the validity of Congress' determination that organized crime leaders kill witnesses against them; limits the coverage of the statute creating the Witness Protection Program; and requires hearings, many of whose major features are not described, and which are, in any event, wholly inadequate to meet the majority's own concerns, much less to deal with other serious problems. Perhaps the Attorney General can figure out what he can lawfully do next. I cannot.

THE COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, DC, August 5, 1975.

File: B-183922.
Matter of: Internal Revenue Service "informant/witness" expenditures.
Digest: Internal Revenue Service general appropriation statute providing for "necessary expenses * * * for investigation and enforcement activities * * * "is sufficiently broad to support expenditures on the behalf of an "informant/witness" except for periods in which the same witness also qualified for such support from Department of Justice pursuant to Title V, "Protected Facilities for Housing Government Witnesses" of the "Organized Crime Control Act of 1970," Pub. L. No. 91-452 (84 Stat. 922, 933) (18 U.S.C.A, § 3481).

This action is in response to a letter dated May 12, 1975, from the Department of the Treasury requesting our decision as to the propriety of expending Internal Revenue Service (IRS) funds for the protection, support, and maintenance of an "informant/witness" in a case involving alleged criminal violations of Internal Revenue Laws.

The facts giving rise to this matter are as follows: From early 1972 until the present, and IRS "informant/witness" (hereafter John Doe) has provided the IRS with information which has proven instrumental in the obtaining of indictments as well as in the collection of investigatory data prior to the indictment stage. John Doe was both an informant for the IRS and a witness for the Department of Justice and for the IRS at all times pertinent to this inquiry. In 1972, the Attorney General classified John Doe as a petential witness with respect to several cases forwarded to the Justice Department by IRS for criminal prosecution. The Attorney General, pur-

suant to Title V "Protected Facilities for Housing Government Witnesses" (hereafter Title V) of the "Organized Crime Control Act of 1970" (84 Stat. 922, 933) (18 U.S.C.A. § 3481), determined that the life and person of John Doe was in jeopardy and, accordingly, authorized protection, support, and maintenance expenditures in John Doe's behalf. John Doe accepted the Attorney General's offer and was enrolled in the Justice Department's Title V Witness Protection Program. In January 1974, John Doe formally executed a waiver of further Title V assistance. The Justice Department then disenrolled John Doe from the Witness Protection Program on January 14, 1974. Subsequent thereto, circumstances changed and John Doe sought reenrollment in the Witness Protection Program. The Attorney General declined further assistance, thereby rendering John Doe ineligible for Title V aid. Thereafter, John Doe sought support and maintenance assistance from the IRS for whom he was aslo serving as an "informant/witness." Upon investigation by the IRS, it was determined that John Doe was in need of support and maintenance assistance if his services as an "informant/witness" were to continue. IRS officials authorized the necessary disbursements until May 1975 when the Department of Justice again determined to render the witness financial assistance. The propriety of the IRS authorization is the subject matter of this inquiry. IRS did not authorize protective expenditures for any period during which John Doe was enrolled in the Department of Justice Title V Witness Protection Program.

This case presents the threshold question as to whether the IRS may properly expend funds for the purpose of protecting, supporting, and maintaining informants and witnesses. Additionally, the facts of this case present the collateral issue of whether support and maintenance expenditures by the IRS, if ordinarily permissible, are authorized after the "informant/witness" is disenrolled from the Justice Department's Title V Witness Protection Program, but, in fact, continues to be a witness for the Justice Department.

The FY 1975 IRS appropriation statute neither contains specific authority nor a specific appropriation for protection, support, and maintenance expenditures on the behalf of an "informant/witness." However, the "Compliance" portion of its general appropriation does provide for the "* * * necessary expenses of the Internal Revenue Service * * * for investigation and enforcement activities * * *." Act of August 21, 1974, Pub. L. No. 93-381, Title 1, 88 Stat. 613. The legislative history of this provision is silent as to the meaning of "investigation and enforcement activities." The numerous objects of expenditures necessary to conduct "investigation and enforcement activities" are obviously quite broad. It is readily apparent, therefore, that a large measure of discretion is vested in the Commissioner as to which expenditures are necessary in aid of "investigation and enforcement activities." Consequently, the use of generally appropriated funds for objects not specifically mentioned in the Appropriations Act, and not otherwise proscribed, will not ordinarily be questioned by this Office when such expenditures are deemed to have a direct connection with and to be necessary to the carrying out of the Appropriation Act's stated general purpose. See B-173149, August 10, 1971. "Informant/witness" maintenance and support aid has long been recognized as an indispensable investigative and law enforcement tool. See generally, *Hearings on S. 30 and Related Bills Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. 545-547 (1969). Without the assurances of maintenance and support, the potential "informant/witness" may be reluctant to aid in the investigative, enforcement, and prosecutorial processes. As early as 1969, Congress was expressly advised of the Treasury Department's extensive involvement in this area and raised no objection thereto. *Hearings on S. 30 and Related Bills Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. 547 (1969); *Hearings on S. 30 and Related Proposals Before Subcommittee No. 5 of the Housing Committee on the Judiciary,* 91st Cong., 2d Sess. 181 (1970). For the foregoing reasons, we view the FY 1975 IRS appropriation statute as sufficiently broad to support the expenditures in question.

Although the IRS may, as a general rule, undertake to make expenditures on the behalf of an informer or witness consistent with the "Compliance" portion of its general appropriation, we believe that the passage of Title V, "Protected Facilities for Housing Government Witnesses" of the "Organized Crime Control Act of 1970," Pub. L. No. 91-452 (84 Stat. 922, 933) (18 U.S.C.A. § 3481), operates as a limitation on the Commissioner's otherwise broad authority. Congress, in enacting Title V, sought to give the Attorney General broad discretionary authority to provide for the protection of actual and potential Government witnesses when organized crime syndicates threatened the life or person of a witness or a member of his family. H.R. Rep. No. 1549, 91st Cong. 2d Sess. 48 (1970); S. Rep. No. 91-617, 91st Cong., 1st Sess. 150 (1969). Formerly, the Justice Department's authority to deal with the problem was

not well defined and each case was approached in an ad hoc fashion. *Hearings on S. 30 and Related Proposals Before Subcommittee No. 5 of the House Committee on the Judiciary.* 91st Cong. 2d Sess. 181 (1970). Title V authorized the Attorney General to provide such amounts as he deemed necessary for the protection, health, and welfare of witnesses and persons intended to be called as a witness whenever, in his discretion, the life or person of an actual or potential witness or a member of his family was in jeopardy as a result of the witness' willingness to testify. It is noted that while the Department of Justice must determine that the witness' life or person is in jeopardy in order to render or continue to render financial assistance, the IRS is not subject to a similar restriction and can make determinations of the need for protective assistance on other grounds. Additionally, Title V aid would not be available unless legal proceedings were involved and the underlying factual situation embraced organized criminal activity.

While we recognize that the general language of the IRS appropriation statute vests broad discretion in the Commissioner to pay protective expenses of an "informant/witness," it does not authorize the simultaneous augmentation of the support and maintenance payments from the Department of Justice received by one enrolled in Title V's Witness Protection Program. The rule is well established that existence of a specific appropriation for an object precludes the use of a more general appropriation which would otherwise be available. B–118803, February 24, 1954; *cf.* 20 Comp. Gen. 739, 741 (1941). In the instant case, however, the IRS seeks a decision as to whether it may properly extend support and maintenance assistance to a person *not* enrolled in the Title V Witness Protection Program. Title V does not operate preemptively merely because John Doe is a witness for the Government in a case involving organized criminal activity if he is otherwise ineligible for Department of Justice protective payments. The operation of Title V requires a determination by the Attorney General that the witness is in jeopardy of life or limb and therefore qualifies for enrollment in the Witness Protection Program. Since, during the period in question, the Attorney General had not designated John Doe as a qualified Title V witness, Title V was not preemptive of the Commissioner's authority to extend support and maintenance assistance in aid of IRS investigation and enforcement activities.

Accordingly, since the IRS made an administrative determination that it was necessary to provide John Doe with support and maintenance assistance in order to retain his continued services as an informant/witness, its appropriations are available to provide such support and maintenance for any period during which he was not a qualified Title V witness enrolled in the Justice Department's Witness Protection Program.

R.F. Keller,
[Deputy] Comptroller General
of the United States.

March 3, 1977.

Taxability of the Funding of Relocated Witnesses

Singleton B. Wolfe,
Assistant Commissioner (Compliance),
Attention: *Director, Intelligence Division.*

In a memorandum (CP:I:0) dated September 30, 1976, the Intelligence Division requested our advice regarding a question raised by the Intelligence and Special Services Unit of the Department of Justice. Mr. Gerald Shur, the head of the witness protection program, asked whether funds spent to relocate witnesses who are in danger would be taxable to the witnesses who are in danger would be taxable to the witnesses. In our opinion these funds would not be so taxable, but rather should be treated as welfare payments.

Under the witness protection program, at the request of the U.S. Attorney or the Strike Force Attorney, the U.S. Marshals Service will relocate the witness in a different part of the country where the witness is not known to the community. The witness is given a new identity and is assisted in securing housing and employment in order to become self-sufficient. The witness is expected to find and accept employment within 120 days of acceptance into the program, during which time assistance is provided in meeting expenses for food and housing for the witness and family. Job assistance is limited to locating one reasonable job opportunity, and refusal of that job by the witness is grounds for termination of maintenance under the program.

I.R.C. § 61(a) defines gross income as all income from whatever source derived. A long-standing exception to this rule applies to welfare payments. See, e.g., Rev. Rul. 74-205, 1974-1 C.B. 20, with which we concurred in G.C.M. 34957, *Denver Urban Renewal Agency,* I-4270 (July 21, 1972). In G.C.M. 36470, *City of Green Bay, Wisconsin,* I-4429 (Oct. 31, 1975), we reexamined the welfare area and concluded that "a payment made by a state is a nontaxable welfare expenditure when it is an outright grant analogous to a gift but is generally taxable when it is intended to compensate an individual in the sense of making a return to him for something he has rendered to the state."

The same principle would, of course, apply equally to payments made to an individual by the Federal Government. The issue, then, is whether payments made under the witness protection program are payments for services or welfare payments.

If this were a fee paid for services, it would clearly be includible in income. Cf. Treas. Reg. § 1.61-2(a)(1); Rev. Rul. 76-374, 1976-40 I.R.B. 5. We do not, however, consider payments made under the witness protection program to be compensation for services. It is not a regular system of payments for witnesses in general. Very few witnesses are taken into the program, as a percentage of the total number of government witnesses. (Most witnesses do not receive any payments under the program because they do not need protection.) The compensation provided witnesses is the per diem payment of $20 under 28 U.S.C. § 1821 (1970). The funding provided under the witness protection program is clearly a special matter, distinguishable from the general witness fee, and specific to the individual being protected.

The statutory authority for the witness protection system is title V of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 933-34. Section 502 of the Act authorizes the Attorney General to "offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses," and their families. Although the legislative history is silent on the issue of taxability, in our opinion this program was intended by Congress to be a welfare program, a subsistance grant to persons in need. Payments under the program could also be considered analogous to relocation payments to persons forced to move to a new home under the Housing and Community Development Act of 1974, in that it is a relocation assistance grant. *See* Rev. Rul. 76-373, 1976-40 I.R.B. 5.

Since the payments under the witness protection program are not compensation for services and because the program was created to ensure the welfare of the protected witnesses, we believe that the funds expended under the program are not includible in the gross income of the witnesses.

This opinion has been coordinated with the Office of the Assistant Commissioner (Technical).

CHARLES L. SAUNDERS, JR.,
Acting Chief Counsel.
(BY) G. NORRIS WATSON,
Assistant Director, Interpretative Division.

BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Chairman, Subcommittee On Courts, Civil Liberties, And The Administration Of Justice, Committee On The Judiciary House Of Representatives

Witness Security Program: Prosecutive Results And Participant Arrest Data

The Witness Security Program was established to protect witnesses who testified in traditional organized crime prosecutions. The program provides witnesses with new identities, relocates them to other communities, and provides them with temporary living allowances. For cases during the period June 1979 to May 1980 involving the testimony of protected witnesses, GAO found that 75 percent of the defendants were found guilty. Of those for whom sentencing information was available, 84 percent were sent to prison with a median sentence of 4.4 years.

Program benefits do not come without costs. GAO found that about 21 percent of the 365 protected witnesses it examined for recidivism who entered the program in fiscal years 1979 and 1980 were arrested within 2 years.

Congress is considering a proposal to establish a program to compensate victims of protected witnesses. This could cost, at most, $2.3 million annually. However, certain victim entitlement characteristics in the proposal may lower the estimated cost.

GAO/GGD-84-87
AUGUST 23, 1984

39-711 - 85 - 16

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

B-197739

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

As a result of your September 14, 1982, request and subsequent discussions with your office, we have conducted an evaluation of the Justice Department's Witness Security Program. This report discusses (1) the results of prosecutions using the testimony of protected witnesses, (2) the criminal activities of protected witnesses, and (3) an analysis of proposed legislation to compensate victims of crimes committed by protected witnesses.

We trust the information provided will be useful to your continuing oversight efforts. As agreed with your office, unless you publicly announce the contents of the report earlier, we plan no further distribution until 15 days from the date of this report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

James J. Anderson

William J. Anderson
Director

GENERAL ACCOUNTING OFFICE
REPORT TO THE CHAIRMAN,
SUBCOMMITTEE ON COURTS, CIVIL
LIBERTIES, AND THE ADMIN-
ISTRATION OF JUSTICE,
HOUSE JUDICIARY COMMITTEE

WITNESS SECURITY PROGRAM: PROSECUTIVE RESULTS AND PARTICIPANT ARREST DATA

D I G E S T

In 1970, the Congress authorized the Attorney General to protect the lives of persons endangered by their testimony against individuals involved in organized criminal activity. In response, the Attorney General established the Witness Security Program. Since its inception, over 4,400 witnesses and 8,000 family members have been admitted to the program, and fiscal year 1983 program costs totaled about $25 million. Protection is provided by giving witnesses new identities, relocating them to other communities, and providing them with temporary living allowances until self-sufficiency can be attained through employment or other legitimate means.

The Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, requested GAO to review several specific aspects of the Witness Security Program. Specifically, GAO was asked to: (1) determine the results of prosecutions using the testimony of protected witnesses, (2) ascertain the nature and extent of criminal activity by protected witnesses, and (3) estimate an annual cost of a victim compensation program for victims of crimes committed by protected witnesses. GAO did not obtain agency comments on this report; however, the facts were discussed with agency officials and they agreed with the facts presented.

USE AND RESULTS OF PROTECTED WITNESSES' TESTIMONY

The Witness Security Program was initially established to help eradicate traditional organized crime. The type of case investigated and prosecuted with the assistance of protected witnesses has changed since the inception of the program in 1970. While over 60 percent of the witnesses entering the program in the early seventies were utilized in traditional organized crime cases, only 27 percent of the witnesses entering the program from June 1979 to May 1980 were used in this fashion. Additionally, protected witness' testimony was used most often in cases involving drugs or narcotics (32 percent) and murder or conspiracy to commit murder (13 percent). (See p. 11.)

In reviewing 220 case summaries involving the testimony of protected witnesses entering the program from June 1979 to May 1980, GAO found that 75 percent of the defendants in these cases were found guilty. Of those for which sentencing information was available, 84 percent were sent to prison and the median sentence imposed was 4.4 years. GAO further identified the prime target defendants or "ringleaders" from the 220 case summaries and determined that 88 percent of these defendants were convicted and received a median prison sentence of 11.2 years. Furthermore, at least one conviction with an incarceration of longer than 1 year was obtained in 87 percent of the 220 case summaries reviewed by GAO. (See pp. 14 to 20.)

CRIMINAL ACTIVITY BY PROTECTED WITNESSES

GAO evaluated the criminal activity of protected witnesses by analyzing all federal rap sheets for witnesses entering the program during fiscal years 1979 and 1980. A rap sheet is a chronological record of a person's criminal arrests. Of the 761 witnesses

entering the program during this time frame, 555 had federal rap sheets before entering the program. GAO found that, on the average, protected witnesses with prior criminal records had been arrested 7.2 times and had been charged with 10.3 crimes before entering the program. GAO also found that, on the average, protected witnesses (170) who were arrested after entering the program were arrested 1.8 times and charged with 2.6 crimes. (See pp. 21 to 24.)

The following chart summarizes GAO's findings relating to the most serious arrest charges against protected witnesses both before and after entering the program. Because of the confidentiality of the protected witnesses' identities, GAO could not determine how many arrests of protected witnesses eventually led to a conviction.

Type of crime	Preprogram (Percent)	Postprogram (Percent)
Violent	53.5	31.2
Property	26.4	35.3
Drug	13.2	11.8
Other	6.9	21.7

GAO found that 21.4 percent of the 365 witnesses it examined for recidivism were arrested within 2 years of entering the program. While this rate of recidivism is similar to 1978 and 1982 Justice studies (15 and 17 percent respectively), the results are not comparable because different methodologies were employed. (See p. 24.)

COMPENSATION FOR VICTIMS OF CRIMES BY PROTECTED WITNESSES

A bill, H.R. 4249, which passed the House of Representatives on May 22, 1984, would authorize a $2 million annual appropriation to fund

a program to compensate victims of violent crimes committed by federally protected witnesses. Because of the relatively small number of compensable victimizations committed by protected witnesses in a year (25 in fiscal year 1982), the overall annual cost would be, at most, $2.3 million. This "worst case" estimate was made, however, without taking two unquantifiable factors into consideration that would very likely lower the cost of such a program. These factors are:

--the bill requires that victims seek compensation from collateral sources (e.g., insurance and state compensation programs) before applying for compensation under this program; and

--not all victims are eligible for compensation because their injuries, if any, may not require medical attention or result in lost time from work. (See pp. 30 to 35.)

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ABBREVIATIONS

FBI	Federal Bureau of Investigation
GAO	General Accounting Office
U.S.C.	United States Code

CHAPTER 1

INTRODUCTION

At the request of the Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, we examined several aspects of the Witness Security Program. This report quantifies the results of prosecutions in which protected witnesses have testified, the criminal activities of protected witnesses after entering the program, and contains an estimate of the potential cost of a legislative proposal to compensate victims of protected witnesses. This report on the Witness Security Program follows a previous report performed at the request of Senator Max Baucus. The prior report, Changes Needed In Witness Security Program (GAO/GGD-83-25, March 17, 1983), discussed procedural deficiencies that have enabled some protected witnesses to avoid their legal obligations to third parties, such as creditors.

THE WITNESS SECURITY PROGRAM

Courts have recognized that citizens generally have a duty to testify in court to aid the enforcement of law. However, the fear of reprisal or retaliation can cause potential witnesses to ignore this duty. This led the Congress to conclude that federal law enforcement efforts would be enhanced if the government took steps to assure witnesses that they and their families would not be harmed as a result of their testimony in criminal proceedings. On October 15, 1970, the Congress formally authorized the Attorney General in Title V of the Organized Crime Control Act of 1970 (Public Law 91-452) to protect the lives of witnesses who testify against persons involved in organized criminal activity. As a result, the Attorney General created a program to protect witnesses--the Witness Security Program.

To enter a witness in the program requires action by a number of parties. First, the prosecuting attorney must transmit an admission request to the Office of Enforcement Operations. Located in Justice's Criminal Division, this group is essentially responsible for determining whether a witness is eligible for admission into the program. The admission request delineates the significance of the case and the expected testimony from the prospective witness. After receiving the request (1) the appropriate investigative agency (e.g., Federal Bureau of Investigation (FBI)) is required to submit a report

concerning the threat to the witness' life; (2) the appropriate Criminal Division unit (e.g., Narcotics and Dangerous Drug Section) is asked to review and comment on the specific case; and (3) the Marshals Service is asked to conduct a preliminary interview with the witness and his/her family. Generally, the Office of Enforcement Operations will make its decision on the program eligibility of a witness only after it has received all the above information.

After a witness enters the program, the Marshals Service is responsible for providing long-term protection. It does this by giving witnesses new identities with supporting documentation (e.g., a new birth certificate and new social security number). Further, it relocates them to areas free from the criminal element they testified against and provides them with a temporary living subsistence until they can achieve self-sufficiency. The Marshals Service also provides or arranges for other types of social services on the basis of individual needs, such as employment assistance, resume preparation, emergency medical treatment, and psychological counseling services. All of this is done with the intent that the witness will become successfully established in his/her new community as a law-abiding citizen.

There has been a significant increase in the usage and, thus, the overall cost of the program. At the time the program was begun, management and budget estimates anticipated between 25 and 50 witnesses would be protected each year at a cost of less than $1 million. However, since its inception in 1970 through fiscal year 1983, over 4,400 witnesses and over 8,000 family members have entered the program. Annual program costs during fiscal year 1983 were about $25 million. The following chart, provided by the Marshals Service, depicts the yearly size and cost of the program.

Fiscal year	Witnesses admitted	Program costs (note a) (millions)
Beginning of program through 1973	647	b
1974	324	$ 3.1
1975	371	11.4
1976	466	12.6
1977	469	12.0
1978	441	11.6
1979	427	19.9
1980	334	21.5
1981	287[c]	24.4
1982	324[c]	28.4
1983	333[c]	24.8

[a]Yearly costs are comprised of Marshals Service salaries and expenses and expenses incurred (e.g., medical or subsistence) for both newly admitted and reactivated witnesses and their family members.

[b]Program costs were not available for this period.

[c]According to the Office of Enforcement Operations, 79, 121, and 128 of the admitted witnesses in fiscal years 1981, 1982, and 1983 respectively were prisoner witnesses.

CONGRESSIONAL INITIATIVES TO IMPROVE THE WITNESS SECURITY PROGRAM

Four bills have been introduced during the 98th Congress--H.R. 4249, S. 474, S. 1178, and S. 1762--which contain provisions to change the operation of the Witness Security Program. As of June 1984, S. 1762 had passed the Senate and H.R. 4249 had passed the House. House bill 4249 proposes changes to the overall operation of the Marshals Service, while S. 1762 is a comprehensive crime control act revision which affects many areas other than the Witness Security Program.

Among the bills' proposals are:

--an equitable solution to the problems that third parties encounter when attempting to enforce civil judgments against protected witnesses,

--an assessment by the Attorney General of whether the need for a witness' testimony outweighs the risk of danger to the public posed by the witness,

--the establishment of a system to securely disseminate the criminal records of protected witnesses to criminal justice agencies, and

--the mandatory federal supervision of protected witnesses who are on state parole or probation when they enter the program.

The bills' provisions are explained in further detail below.

Enforcing civil judgments against protected witnesses

A previous GAO report, Changes Needed in Witness Security Program (GAO/GGD-83-25, March 17, 1983), discussed program deficiencies that enabled some protected witnesses to avoid their legal obligations to third parties, such as creditors and spouses possessing child custody or visitation orders. The report recommended that third parties be given the right to seek a judicial review of the Attorney General's decision not to disclose information on witnesses to aid the third party's enforcement efforts. Both H.R. 4249 and S. 1762 propose a solution to this problem which is slightly different from the solution we proposed. To address the debt collection problem, the bills call for the judicial appointment of a master or guardian to act, in essence, as a collection agent for the third party. To address the enforcement of child custody or visitation orders, H.R. 4249 establishes a formal arbitration process, but S. 1762 does not address this issue.

Attorney General's risk assessment

Both bills contain a provision that would require the Attorney General, before admitting a witness into the program, to determine whether the need for the witness' testimony outweighs the risk he/she poses to the public. The bills require a consideration of, among other things, the witness' past criminal record and the results of psychological examinations. The Marshals Service administers vocational and psychological tests to witnesses; however, they are not routinely used as a precondition to admittance.

Dissemination of witnesses' criminal histories

Indiscriminate dissemination of a protected witness' criminal history to state and local criminal justice agencies could potentially compromise the witness' new identity and place him/her in danger. As a result, the Justice Department has established a method designed to securely provide a protected witness' criminal record identified through a fingerprint search to a requesting agency. Because of security concerns, however, Justice has not developed a means to routinely transmit a witness' criminal record (earned under his/her old and new identity) through its on-line computer criminal history file.[2] Consequently, a check of the on-line criminal history file under the new identity of a protected witness could produce a "no-record" response if a witness had been arrested under his/her old identity. Both H.R. 4249 and S. 1762 call for the Attorney General to correct this deficiency.

Federal supervision of witnesses on state parole or probation

Proper supervision of protected witnesses mandated to have parole or probation supervision has been a longstanding problem. In fact, until 1982 federal parolees who entered the program were not routinely supervised. More recently, the Marshals Service has attempted to affect supervision over some protected witnesses on state parole or probation. In this regard, the state to which the witness is to be relocated has to agree to supervise the witness once he/she is relocated.

House bill 4249 proposes a different mechanism to supervise state parolees or probationers, while S. 1762 does not address the issue. Under H.R. 4249, federal probation officers would have the statutory authority to supervise protected witnesses who are on state parole or probation supervision. The legislatively proposed system would allow state witnesses to be supervised under the procedures already in place for federal parolees and probationers.

OBJECTIVES, SCOPE, AND METHODOLOGY

As a result of the Chairman's request and subsequent discussions with his office, it was agreed that this review would address three objectives. These were to

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[2]For a detailed analysis of this problem, see appendix III.

--determine the law enforcement benefits that are derived from the testimony of protected witnesses;

--determine the nature and extent of criminal activity by protected witnesses, including a recidivism rate;

--estimate a cost of a victim compensation program for victims of crimes committed by protected witnesses.

To accomplish our objectives, we

--interviewed officials of the Marshals Service and Office of Enforcement Operations, Criminal Division, about the operation of the Witness Security Program;

--interviewed officials of the U.S. Parole Commission about recidivism studies;

--interviewed FBI officials relating to the dissemination of protected witnesses' criminal histories to state and local law enforcement agencies;

--interviewed officials of the U.S. Parole Commission and the Probation Division of the Administrative Office of the U.S. Courts relating to the supervision of protected witnesses;

--interviewed officials of the New York State Parole Commission regarding supervision of parolees from New York who are protected witnesses;

--interviewed psychologists regarding the Marshals Service's use of psychological tests on protected witnesses;

--reviewed federal rap sheets and psychological test information provided to us by the Marshals Service;

--reviewed summaries of cases involving the testimony of protected witnesses provided to us by the Office of Enforcement Operations;

--reviewed studies relating to victim compensation programs and criminal recidivism; and

--analyzed current congressional efforts to improve the operation of the Witness Security Program.

At the request of the Chairman's office, we did not obtain agency comments. We did, however, discuss the results of our work with Justice officials. These officials agreed with the facts presented. Except for not obtaining comments, our work was conducted in accordance with generally accepted government auditing standards. We performed our audit work from October 1982 to April 1984.

Explanation of sample used to evaluate use and results of protected witness testimony

The Office of Enforcement Operations provided us with summaries of prosecutions involving all 308 witnesses admitted to the program between June 1979, and May 1980. This period was chosen by Justice because (1) it provides a sufficient amount of time for the completion of almost all cases, thus enabling a more accurate assessment of results; and (2) it provides a view of the program which is reflective of current conditions because the Office of Enforcement Operations was established in February 1979.

The type of information we requested from the Office of Enforcement Operations included a summary of the nature of the case, a list of all potential defendants and their roles in the case, the outcome of the case in relation to each defendant (including the sentence imposed), the witnesses' relation to the case, a description of the threat to the witness, and any benefits derived outside the witness' specific testimony.

Of the 308 witness case summaries requested, only 220 were used in the analysis of the use and results from protected witnesses participating in prosecutions. Eighty-eight witness case summaries were excluded because:

--Witnesses testified in prosecutions already included in the other 220 case summaries, and their inclusion would have represented a "double counting" (53 case summaries).

--Witnesses refused to enter the program after being authorized for admission or did not testify in a case (22 case summaries).

--There was no information or insufficient information to make a proper analysis (6 case summaries).

--Other miscellaneous reasons existed, such as a witness who entered the program at the behest of a foreign government (7 case summaries).

We identified 1,541 potential defendants from the 220 witness case summaries we examined. Of the 1,541 potential defendants, 76 were never indicted, insufficient information existed for our analysis on 39 defendants, and other reasons existed (e.g., those who were fugitives, were deceased, or whose status was pending) why no disposition could be recorded for 143 defendants. As a result, only 1,283 defendants' dispositions could be determined.

We also evaluated the type of criminal activity committed and the composition of the group allegedly perpetrating the crime for each of the 220 case summaries. In some cases, we found that a prosecution was aimed at more than one type of crime. For example, one prosecution was aimed at a crime group allegedly involved in extortion and fraud. Thus, multiple designations for the same case summary occurred. Accordingly, our analysis of the 220 witness case summaries actually resulted in 276 separate designations spread among 18 different crimes and 8 crimes groups.

Explanation of sample used to quantify the criminal activities of protected witnesses and estimate the cost of a victim compensation program

It was agreed with the Marshals Service that it would request a rap sheet[3] from the FBI for all 761 protected witnesses entering the program in fiscal years 1979 and 1980. This time period was chosen for the sample because it would (1) provide a 2 year observation period to measure criminal recidivism for the majority of the witnesses, (2) allow for possible comparison with recidivism studies performed on other populations, and (3) be a relatively current reflection of the criminal activities of protected witnesses.

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[3]A rap sheet is a chronological record of a person's criminal arrests and dispositions.

Criminal activity of witnesses

For the 761 witnesses in our sample, we received 573 rap sheets. We analyzed these rap sheets for both the total and type of crimes witnesses were arrested for before and after they entered the Witness Security Program.

We had to perform a separate analysis to compute a rate of recidivism. To do this, a number of the 573 witnesses with rap sheets had to be excluded from this analysis to make it consistent with traditional recidivism studies. We excluded 208 witnesses because:

--18 witnesses were arrested only after they entered the program and, by definition, could not be considered recidivists;

--107 witnesses were incarcerated at the time they entered the Witness Security Program and were not released in time to allow them to have the 2 year standard observation period; and

--83 witnesses had unavailable or incomplete information for this analysis.

Choice of recidivism criterion

Our recidivism analysis used the criterion of arrest regardless of disposition or sentencing outcome. This criterion was used because over 60 percent of the witnesses' arrests had unknown dispositions, and we were unable to follow up a specific arrest because the rap sheets had been sanitized of any identifying information. The U.S. Parole Commission has conducted studies aimed at computing a recidivism rate for federal prison releasees. In its studies, different recidivism criteria have been used. For instance, in one study similar to our study, an arrest regardless of disposition or sentencing outcome was used as the recidivism indicator. Another study only considered those arrests with an imprisonment of 60 days or more as a valid indicator of recidivism.[4] Because not all arrests lead to a

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[4]Both measures of recidivism also include prison releasees with parole violation difficulties and those releasees who died during the commission of a criminal act.

conviction and subsequent imprisonment, more federal prison releasees would meet the former definition of recidivism than the latter.

The Parole Commission believes that the simple arrest criterion is adequate when establishing macroscopic parole policies and when assessing the predictive power of its salient factor score.[5] On the basis of the Parole Commission's previous use of this criterion and its findings, we do not believe the choice and use of this criterion in our study creates any methodological difficulties.

Victim compensation analysis

The 573 sample witness rap sheets discussed above were used for this analysis. The exclusions applied above to the recidivism rate analysis do not apply to this analysis. We used the arrest charges of homicide, rape, robbery, kidnapping, assault, and battery as the crimes that could give rise to victim compensation. These crimes are similar to those specifically listed by jurisdictions with victim compensation programs and with the FBI's categories of violent crime. Fiscal year 1982 was chosen as the time period within which to assess the number of violent/potentially compensable crimes. Because our sample witnesses entered the program during fiscal years 1979 and 1980, many witnesses might have been in prison during fiscal year 1981. Thus fiscal year 1981 was rejected as the observation period. Fiscal year 1983 was also rejected because the rap sheets were "pulled" by the FBI beginning in March 1983, thus not allowing for a full year of observation. A more complete description of our methodology used to estimate victim compensation is contained in chapter 4.

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[5]An actuarial device used in the parole decisionmaking process to predict future criminality of prison releasees based on the existence or nonexistence of six variables.

CHAPTER 2

PROTECTED WITNESS TESTIMONY: USE AND RESULTS

The Witness Security Program was initially established as a tool to help eradicate traditional organized crime. The types of cases investigated and prosecuted with the assistance of protected witnesses have changed since the inception of the program in 1970. Over 60 percent of the witnesses entering the program in the early seventies testified in traditional organized crime prosecutions. In contrast, our analysis of witnesses admitted during June 1979 to May 1980 showed that this traditional organized crime relationship had fallen to 27 percent. Other crime groups, such as drug rings, accounted for 43 percent of the 1979 and 1980 prosecutions. Additionally, during this time period, the program was used most often in cases involving drugs or narcotics (32 percent) and murder or conspiracy to commit murder (13 percent).

In reviewing 220 case summaries involving the testimony of protected witnesses, we found that 75 percent (965 of 1,283) of the defendants were found guilty. For the defendants found guilty, 84 percent were sent to prison and the median sentence imposed was 4.4 years. From the 220 case summaries, we further identified 169 "ringleader" defendants and analyzed the dispositions of 150 of these defendants. Eighty-eight percent of the 150 were convicted and received a median prison sentence of 11.2 years. Furthermore, at least one conviction with an incarceration greater than 1 year was obtained in 87 percent of the 220 case summaries reviewed.

USE OF THE WITNESS SECURITY PROGRAM HAS CHANGED OVER YEARS

Only 27 percent of the protected witnesses entering the program from June 1979 to May 1980 were utilized in traditional organized crime prosecutions compared to over 60 percent for witnesses entering the program in the early seventies. Justice's expansion of the program from its original focus is consistent with current congressional efforts to specifically provide that the Attorney General may furnish witness protection in cases other than those involving traditional organized crime.

Congressional hearings concerning the increased influx of "organized crime" into both illegal and legal segments of society led to the passage of the Organized Crime Control Act of 1970 (codified as a note to 18 U.S.C. 3481). The purpose of the act was to seek the eradication of organized crime by strengthening the legal tools used in the evidence gathering process. Title V of the act authorizes the Attorney General to provide security to persons intended to be called as government witnesses in federal or state proceedings instituted against any person alleged to have participated in organized criminal activity. From this authorization, the Attorney General created the Witness Security Program.

Like the statutory language of Title V relating to witness eligibility, Justice's criteria for admission to the Witness Security Program is broad. According to Justice, a witness may be authorized to participate in the program if he/she is to testify as an essential witness in a specific case that is important to the administration of criminal justice and has a link to organized criminal activity and there is a clear indication that the life of the witness or a family member is in immediate jeopardy. This admission criterion gives the Attorney General wide latitude in program usage.

A 1978 Justice report[1] showed that 65 percent of a sample of witnesses entering the program during 1970, 1971, and 1972 had traditional organized crime connections, while only 39 percent of a sample of witnesses entering the program in 1975, 1976, and 1977 had this connection. Furthermore, our analysis showed this traditional organized crime relationship to have fallen to 27 percent for the witnesses entering the program from June 1979 to May 1980.

Justice's expansion of the program from its original focus on organized crime cases is consistent with congressional attempts over the past few years to specifically provide that the Attorney General may furnish protection to witnesses in cases other than those involving traditional organized crime. Several criminal code reform bills introduced from 1977 to 1983 have

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[1]The report resulted from an internal Justice study conducted by the Witness Security Program Review Committee. The review committee, which was formed in response to both internal and external criticism of the program, looked at many aspects of the program, including program purpose and admission standards and procedures.

provided that witness protection may be furnished in cases where danger to the witness or his/her family was involved. The Senate Report (97-307) on S. 1630 released in December 1981 elaborated on this point:

> "There is no reason to deny protection to a witness who is in danger of retaliation simply because the nexus between the offense and organized criminal activity is lacking. For instance, a rape victim fearing retaliation from her assailant may not be willing to testify unless relocation or protection is made available."

The Congress is currently considering two bills--H.R. 4249 and S. 1762 (Criminal Code Reform Act)--which contain provisions that would specifically expand the Attorney General's admittance authority.

TYPES OF PROSECUTIONS USING PROTECTED WITNESSES

As mentioned earlier, a wide variety of crimes and crime groups are prosecuted with the assistance of protected witnesses' testimony. Our analysis showed that protected witnesses' testimony is most often used in cases involving drugs or narcotics (32 percent) and murder or conspiracy to commit murder (13 percent). The type of perpetrator or group most often prosecuted utilizing protected witness testimony are other organized crime groups, e.g., drug rings (43 percent) and traditional organized crime groups (27 percent). The chart on the following page shows the frequency that a crime or crime group was prosecuted utilizing the testimony of a protected witness. As noted on page 8, even though 220 case summaries were analyzed, 276 separate designations were made because some case summaries involved more than one crime or crime group.

TARGETS OF PROSECUTIONS USING THE TESTIMONY OF PROTECTED WITNESSES

By crime	Number	Percent
Drugs/narcotics	87	31.5
Murder/conspiracy to commit murder	36	13.1
Robbery	20	7.2
Corruption	17	6.2
Interstate transportation of stolen goods	16	5.8
Extortion	15	5.4
Fraud/swindle	12	4.3
RICO[a]	11	4.0
Arson	11	4.0
Burglary	10	3.7
Weapons/explosives	8	2.9
Prostitution	7	2.5
Tax evasion	6	2.2
Counterfeiting	5	1.8
Gambling	4	1.4
Pornography	3	1.1
Rape	2	.7
Other	6	2.2
Total	276	100.0

By crime group	Number	Percent
Other organized crime crime group[b]	118	42.8
Traditional organized crime group	74	26.8
Single criminal act by person or group	41	14.9
Public official	18	6.5
Motorcycle gang	10	3.6
Union officials	6	2.2
Prison gang	5	1.8
White collar professional	4	1.4
Total	276	100.0

[a]Racketeer Influenced and Corrupt Organizations (RICO) (18 U.S.C. 1961-1968) generally prohibits the financing, acquisition, or operation of businesses through illegal activities or the proceeds derived therefrom.

[b]This category is for groups engaged in a pattern of illegal activity as opposed to a single criminal act.

Appendix I contains a two-dimensional presentation of the above information.

RESULTS OF PROSECUTIONS USING THE TESTIMONY OF PROTECTED WITNESSES

On the basis of our review of 220 case summaries, 75 percent, or 965 of the 1,283 defendants prosecuted employing the

testimony of protected witnesses were eventually found guilty.[2] While 57 guilty defendants' sentences could not be determined from the information provided us, we found that 84 percent of the remaining 908 guilty defendants received prison sentences, and the median sentence imposed was 4.4 years. These prosecutions resulted in significantly more severe sentences than federal felony prosecutions in general or organized crime strike force prosecutions.[3] Furthermore, those defendants identified as prime targets or "ringleader" defendants were found guilty more often and received more severe sentences than defendants in protected witness prosecutions in general. Finally, on a case-by-case basis, the vast majority of protected witness prosecutions resulted in at least one conviction with an incarceration of greater than 1 year.

The dispositions of the 1,283 defendants identified in our review of the 220 case summaries are detailed below.

	Number	Percent
Pleaded guilty or no contest	462	36.0
Convicted after trial	441	34.4
Guilty/unknown[a]	62	4.8
Acquitted	131	10.2
Dismissed or decision by the U.S. Attorney not to proceed with case	187	14.6
Total	1,283	100.0

[a]This category includes defendants who were guilty and were sentenced; however, it is unknown whether they plead guilty or were convicted.

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[2]In comparison, 83.7 percent of the defendants in all statistical year 1983 (July 1, 1982 to June 30, 1983) federal felony prosecutions were guilty.

[3]Strike forces are groups of federal investigators and attorneys and, in many cases, state and local officials located in specific geographic locations focusing on prosecuting organized criminal activities.

We analyzed the 965 defendants who were found guilty to determine what type of sentences were imposed. While 57 guilty defendants' sentences could not be determined from the information provided to us, the sentences of the remaining 908 guilty defendants are detailed in the following chart.

Sentence imposed	Number	Percent
Fine only	4	.4
Probation only	142	15.6
Less than 1 year	66	7.3
1 to less than 2 years	65	7.2
2 to less than 4 years	147	16.2
4 to less than 6 years	151	16.6
6 to less than 8 years	54	6.0
8 to less than 10 years	55	6.1
10 to 15 years	118	13.0
Greater than 15 to 20 years	31	3.4
20 years or more	54	5.9
Life[a]	21	2.3
Total	908	100.0

[a]A death sentence was counted as a life sentence.

In addition to the sentences detailed above, 91, or 10 percent, of the 908 sentenced defendants received a term of probation in addition to their imprisonment, while 159, or 17.5 percent, had fines imposed in addition to their sentences of imprisonment and/or probation. The total dollar value of the fines imposed was about $3.8 million.

Comparison of prosecutive outcomes

We compared the sentencing outcomes of protected witness prosecutions with the sentencing outcomes of (1) federal felony prosecutions terminated in 1983;[4] and (2) fiscal year 1981 federal organized crime strike force prosecutions as reported by Justice in their comments dated August 13, 1981, to our prior report, Stronger Federal Effort Needed In Fight Against Organized Crime, (GGD-82-2, Dec. 7, 1981). In general, the protected

[4]The Administrative Office of the U.S. Court's 1983 statistical year is from July 1, 1982, to June 30, 1983.

witness prosecutions resulted in significantly more severe sentences than either the federal felony prosecutions or the federal organized crime strike force prosecutions. A breakdown of the sentencing outcomes for the three prosecution groups is listed below.

	1983 federal felony (note a)	Strike force	Protected witness
	(percent)		
Sentence imposed			
Probation only[b]	38	26	16
less than 2 years	26	30	14
2 years or greater	36	44	70
Total	100	100	100

[a]Sentences that were not calculable (e.g., those that were indeterminate) were excluded from this section.

[b]Defendants receiving the lesser "fine only" sentence (1 percent of the total) were excluded from the federal felony and protected witness columns of this analysis for ease of comparison.

Caution should be used when contrasting the sentences handed out in prosecutions involving protected witnesses with sentences handed out in other types of prosecutions. For example, one would expect that the composition of the federal felony defendants would be different from the other two groups in terms of having a larger number of first-time offenders. It follows logically that this group would receive less severe sentences. Additionally, it is possible that some protected witness prosecutions are included in the federal felony totals as well as in the strike force prosecutions. Thus, some overlap may have occurred.

Convictions of prime targeted defendants/ringleaders

On the basis of our analysis of case summaries provided to us, we identified 169 prime target defendants.[5] Seven of these defendants, referred to as "ringleaders", were eliminated from this analysis because they were not indicted; 12 others were eliminated because their dispositions could not be determined (e.g., fugitive or missing information). The dispositions of the remaining 150 ringleader defendants follow:

	Number of defendants	Percent
Pleaded guilty or no contest	37	24.7
Convicted	89	59.3
Guilty/unknown[a]	6	4.0
Acquitted	10	6.7
Dismissed or prosecution decision not to proceed with case	8	5.3
Total	150	100.0

[a]This category includes defendants who were guilty and sentenced; however, it is unknown whether they plead guilty or were convicted.

We were able to ascertain the sentences imposed on 131 of the 132 guilty ringleader defendants. These sentences follow.

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[5]In many instances the Office of Enforcement Operations designated a defendant as being a prime target. In other instances, we made this determination by evaluating the case information.

Sentence imposed	Number of defendants	Percent
Fine only	-	-
Probation only	1	.7
Less than 1 year	7	5.3
1 to less than 2 years	4	3.1
2 to less than 4 years	10	7.6
4 to less than 6 years	22	16.8
6 to less than 8 years	6	4.6
8 to less than 10 years	8	6.1
10 to 15 years	33	25.2
Greater than 15 to 20 years	11	8.4
20 years or more	20	15.3
Life[a]	9	6.9
Total	131	100.0

[a]A death sentence was counted as a life sentence.

A couple of comparisons between ringleader defendant prosecutions and protected witness prosecutions in general may be significant. First, the overall guilty rate (convictions and pleas of guilty or no contest) was higher for the ringleader defendants: 88.0 percent to 75.2 percent, respectively. Second, the conviction/acquittal ratio[6] for ringleader defendants was substantially higher: 8.9 to 3.4. Finally, the severity of sentences imposed on ringleader defendants was substantially higher than those imposed in protected witness prosecutions in general. The median sentence imposed on ringleader defendants was 11.2 years, while the median sentence imposed on all defendants was 4.4 years.

Further analysis of protected witness prosecutions

The information on prosecutions presented above relates to results in the aggregate. Some further analysis may help better demonstrate Justice's prosecutive experiences on a case-by-case basis. To do this, we evaluated the 220 case summaries to determine what percentage of the summaries had (1) at least one defendant convicted, and (2) at least one defendant incarcerated

[6]This ratio measures prosecutive success in cases that went to trial.

for more than 1 year. For this first point, we found that 190 case summaries, or 90 percent, had at least one person convicted; 20 did not have any convictions; and 10 case summaries were pending or had insufficient information for this analysis. For the second point, we found that 181 case summaries, or 87 percent, had at least one person sentenced to greater than 1 year; 27 did not; and 12 case summaries were pending or had insufficient information for this analysis.

As can be seen, the vast majority of the summaries had at least one defendant convicted and sentenced to more than 1 year. Stated another way, very few of the cases utilizing the testimony of protected witnesses were completely unsuccessful. For those cases, a mitigating factor may be found by analyzing these cases in terms of the number of defendants. Specifically, the 20 case summaries without a single conviction had an average of 2.5 defendants compared to an average of 6.4 for the remaining summaries. Furthermore, the 27 case summaries without an incarceration greater than 1 year had an average of 2.8 defendants compared to 6.7 for the remaining summaries.

CHAPTER 3

CRIMINAL ACTIVITY OF PROTECTED WITNESSES

On the average, protected witnesses with a federal rap sheet, who entered the program during fiscal years 1979 and 1980, had been arrested 7.2 times and had been charged with 10.3 crimes before entering the program. In terms of most serious preprogram arrest, 53.5 percent of the witnesses had been arrested for violent crimes, 26.4 percent for property crimes, and 13.2 percent for drug-related crimes. On the average, a protected witness arrested after entering the program had been arrested 1.8 times and was charged with 2.6 crimes. In terms of most serious postprogram arrest, 31.2 percent of the witnesses had been arrested for violent crimes, 35.3 percent for property crimes, and 11.8 percent for drug-related crimes. Because of the confidentiality of the protected witnesses' identities, we could not determine how many arrests of protected witnesses eventually led to a conviction.

Our sample of protected witnesses had a 2 year recidivism rate of 21.4 percent. More specifically, 78 of the 365 witnesses entering the program (with prior criminal records) were arrested within 2 years after entering the program. While this rate of recidivism is similar to previous Justice studies (15 and 17 percent), the results are not comparable because different methodologies were used.

ARREST EXPERIENCE OF PROTECTED WITNESSES

Protected witnesses are usually found within the criminal organization they are going to testify against. As such, most protected witnesses have prior criminal records before entering the program. In fact, we found that 555 of 761, or 73 percent, had been arrested and had a federal rap sheet before entering the program. On the average, witnesses who had been arrested before entering the program, had been arrested 7.2 times (median 5) and had been charged with 10.3 crimes before entering the program. Similarly, we found that 170 of the 761 witnesses were arrested after they entered the program. On the average, these witnesses had been arrested 1.8 times (median 1) and had been charged with 2.6 crimes.

Protected witnesses have been arrested and charged with a wide variety of crimes both before and after entering the program. A review of witnesses' rap sheets in terms of their most serious preprogram arrests showed that 53.5 percent had been arrested for violent crimes, 26.4 percent for property crimes, and 13.2 percent for drug-related crimes. The corresponding numbers for postprogram arrests were 31.2 percent for violent crimes, 35.3 percent for property crimes, and 11.8 percent for drug-related crimes.

Frequency of arrest

We found that the 555 witnesses who had been arrested prior to entering the program had been arrested a total of 3,984 times, or an average of 7.2. These witnesses were charged with a total of 5,737 crimes, or an average of 10.3. The following is a frequency breakdown of the 555 witnesses' preprogram arrests.

Number of arrests	Number of witnesses	Percent
1	77	13.9
2	63	11.4
3	62	11.2
4	43	7.7
5	47	8.5
6 to 7	57	10.3
8 to 10	74	13.3
11 to 15	76	13.6
16 to 20	37	6.7
over 20	19	3.4
Total	555	100.0

A total of 170 of the 761 witnesses entering the program during fiscal years 1979 and 1980 were arrested after entering the program. These witnesses were arrested a total of 314 times, or an average of 1.8, and were charged with 446 crimes, or an average of 2.6. A frequency breakdown of the 170 witnesses' postprogram arrests follows.

Number of arrests	Number of witnesses	Percent
1	98	57.6
2	39	22.9
3	16	9.4
4	7	4.2
5 or more	10	5.9
Total	170	100.0

Offense severity

To assess the seriousness of each arrest, we used a schedule of arrest charges used by the U.S. Parole Commission in a study published in 1979. The following chart presents a frequency distribution of the 555 witnesses' most serious preprogram arrests.

Most severe offense	Number of witnesses	Percent
Homicide	47	8.5
Kidnapping	19	3.4
Rape	16	2.9
Other sex offense	13	2.3
Robbery	139	25.0
Assault	63	11.4
Burglary	43	7.7
Theft/larceny	64	11.5
Vehicle theft	6	1.1
Forgery/fraud	34	6.1
Heroin	21	3.8
Drugs: unspecified or other than heroin or marijuana	44	7.9
Marijuana	8	1.5
Weapons	8	1.5
All other	30	5.4
Total	555	100.0

As the chart indicates, 53.5 percent of the witnesses' most serious preprogram arrests were for violent crimes (homicide, kidnapping, rape, other sex offenses, robbery, and assault); 26.4 were property crimes (burglary, theft/larceny, vehicle

theft, and forgery/fraud); and 13.2 percent were drug-related (heroin, marijuana, and other drug offenses).

The chart below is a frequency distribution of the 170 witnesses' most serious postprogram arrests.

Most severe offense	Number of witnesses	Percent
Homicide	6	3.5
Kidnapping	4	2.4
Rape	1	.6
Other sex offense	-	-
Robbery	19	11.2
Assault	23	13.5
Burglary	9	5.3
Theft/larceny	28	16.5
Vehicle theft	5	2.9
Forgery/fraud	18	10.6
Heroin	1	.6
Drugs: unspecified or other than heroin or marijuana	11	6.5
Marijuana	8	4.7
Weapons	6	3.5
All other	31	18.2
Total	170	100.0

As the chart indicates, 31.2, 35.3, and 11.8 percent of the witnesses' most serious postprogram arrests were for violent, property, and drug-related offenses, respectively.

The observation that protected witnesses were arrested more often and charged with more serious crimes before they entered the program when compared with postprogram arrest data may be almost entirely caused by differences in the pre- and post-program observation periods. For example, many witnesses had criminal histories of 10 or more years before they entered the program, while the average postprogram observation period for the witnesses sampled was only about 3.5 years.

TWO YEAR RECIDIVISM RATE FOR PROTECTED WITNESSES

About 21 percent of the protected witnesses we examined for recidivism were arrested within 2 years of entering the program. This recidivism rate is similar to previous studies by

Justice. However, methodological differences make comparisons inappropriate. A previous recidivism study on federal prison releasees employing methodology similar to ours found a recidivism rate of 47 percent. While comparable to our study from a methodological standpoint, the differences in the recidivism rates of protected witnesses and federal releasees may be due to differences in group composition and in how each group recidivates over time.

Overall arrest data converted to a revidivism rate

Traditional recidivism studies define recidivism as the percentage of individuals who relapse within a specified period of observation. For our purposes, we have defined recidivism rate as the number of witnesses with prior criminal records who are arrested within 2 years of entering the program as a percentage of all witnesses who were observed for the 2-year period. We were unable to ascertain how many of the arrests led to a conviction because the rap sheets had been sanitized of any identifying information. We had to make several adjustments to our witness arrest data to make it conform to this traditional method of measuring recidivism.

As mentioned earlier, we received 573 federal rap sheets. However, 208 witnesses' rap sheets had to be excluded for the following reasons:

--18 witnesses were arrested only after they entered the program and, by definition, could not be considered recidivists;

--107 witnesses were incarcerated at the time they entered the Witness Security Program and were not released in time to allow them to have the 2 year follow-up period; and

--83 witnesses had incomplete or unavailable information to perform this analysis.

Of the 365 federal witness rap sheets analyzed, 78 witnesses were arrested within the 2 year observation period. Thus, the 2 year recidivism rate for protected witnesses was 21.4 percent.

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Past Justice efforts to compute witness recidivism

The Justice Department conducted two studies to assess the extent of criminal activity by relocated witnesses. While both studies resulted in similar recidivism rates, neither computed a recidivism rate over a specified period of time. Thus, neither study is comparable to our analysis.

In 1978, the Witness Security Review Committee, as a part of its overall evaluation of the Witness Security Program, reported that 15 percent of the 200 sampled witnesses admitted to the program between 1970 and 1977 had been arrested at least once since their entry into the program. In fiscal year 1982, the Marshals Service reviewed the files for 1,174 witnesses entering the program from October 1978 to April 1982 and found that 17 percent of the witnesses not in prison had been arrested since their entry into the program. Both studies were prepared differently from traditional recidivism studies in that they used different follow-up periods for each witness. Specifically, some witnesses may have had 3 years in which to have been arrested, while others may have had only 6 months. In contrast, our study evaluated whether a witness had been arrested within a specified time period (2 years) after the witness entered the program. Because our study was conducted in this latter fashion, it is not directly comparable with the previous Justice Department studies.

Observations on comparison of recidivism rates

As noted above, 21.4 percent of the protected witnesses entering the program during fiscal years 1979 and 1980 were arrested within 2 years. In contrast, 47 percent of the people released from federal prison were arrested within 2 years of their release. In the aggregate, protected witnesses in our sample recidivated less than prison releasees within 2 years; however, caution must be used in comparing this data.

At first glance, it would appear that the Witness Security Program may have a general rehabilitative effect on its participants when compared with prison releasee recidivism. However, drawing this conclusion requires the making of two major assumptions; that

--the compositions of the two groups are similar enough to allow a direct comparison, and

--the two groups' rates of recidivism are similar over time.

Group composition

The previous histories or characteristics of a control group play an important part in both predicting recidivism and interpreting its occurrence. For example, one would not normally expect a group of first time offenders and a group of habitual criminals to recidivate at the same rate. However, after certain characteristics of both groups (e.g., type and frequency of criminal arrests) are quantified and analyzed, it might become clearer why one group recommits crimes at a higher rate than the other group.

Many criminal justice research projects have been conducted trying to correlate a person's characteristics, including past criminal history, with his/her propensity to recidivate. Different methods have been employed to predict future criminal conduct. They have ranged from a simple scoring device using items found to be predictive to more sophisticated mathematical weighting methods, such as multiple regression.

On the federal level, the Parole Commission uses an additive device--the salient factor score--to aid the parole decisionmaking process by attempting to predict future criminality of prison releasees. The current salient factor device scores each prospective releasee on six variables, and a total score of from 0 to 10 is computed. On the basis of the score, a releasee is placed in one of four risk categories. The following chart taken from a 1979 study[2] illustrates the relationship between risk categories and recidivism.

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[2]"Post Release Arrest Experiences Of Federal Prisoners: A Six-Year Follow-up" Journal of Criminal Justice, Vol. 7, No. 3, 1979, pp. 193-216.

Risk category	Number in category	Number arrested[a]	Percent arrested
Poor	532	346	65.0
Fair	472	256	54.2
Good	483	187	38.7
Very good	319	57	17.9
Total	1,806	846	46.8

[a]Within 2 years of release.

The linear relationship between risk category (as determined by the salient factor score) and recidivism rate has been affirmed on several occasions by the Parole Commission. One can easily see how a different composition of prison releasees in terms of risk categories would dramatically affect the groups' overall recidivism rate. Validating the hypothesis that the Witness Security Program may have a rehabilitative effect on its participants would be inappropriate without first determining what the expected recidivism rate of the participants would be absent the program (e.g., placing witnesses in the various risk categories). It could be that our sample of protected witnesses had a high concentration of persons classified in the "good" and "very good" risk categories and that the expected 2-year recidivism rate of the group was only 15 percent.[3] In this situation, one could not say that the program, with a computed recidivism rate of 21.4 percent, had a rehabilitative effect.

Comparing rates over time

The recidivism rate we computed is, in essence, a "snapshot" of what has happened the first 2 years after a witness entered the program or was released from prison. In comparing the recidivism rates of prison releasees and protected witnesses, the second major assumption that has to be scrutinized is whether each group's rates are comparable over time. In

[3]This is assuming that the validity of the salient factor device was successfully tested against a sample of protected witnesses.

other words, does one group tend to recidivate during the first years of observation, whereas the other group recidivates later, perhaps after the observation period.

In its previous studies, the Parole Commission has shown that the overall recidivism rates of prison releasees increase over time, but at a decreasing rate. For example, in the study cited earlier, while 46.8 percent of the releasees were arrested within 2 years, only 15.7 percent releasees were arrested during the next 4 years. It is not certain how this long term declining recidivism rate would hold up for protected witnesses. While 73 percent of our sampled protected witnesses had prior criminal records and many had been state or federal parolees, characteristics unique to the Witness Security Program may alter the recidivism rate over time relationship.

After entering the program, protected witnesses are given a monthly living subsistence while employment is being sought. Witnesses are often being transported to and from their "danger" area to testify during their initial period in the program. As a result, seeking employment during this period is difficult and the average witness remains on subsistence for 18 months. This factor, along with the frequent contact with Marshals Service personnel during the initial period in the program, could "delay" a protected witness' propensity to commit a crime during his/her initial period in the program. A longer follow-up period than the 2 years our study encompasses would be necessary to determine whether any recidivism "delay" was permanent (proving the program's rehabilitation hypothesis) or temporary (proving a different recidivism to time relationship).

In the future, refinements in data collection would make comparison of recidivism rates more definitive. Assigning a past group of protected witnesses a salient factor score would allow direct comparison with prison releasees in terms of expected recidivism rates and risk categories. Furthermore, expanding the follow-up period would isolate some unique characteristics of the Witness Security Program that may be affecting the recidivism over time relationship.

CHAPTER 4

POTENTIAL COST OF A LEGISLATIVE PROPOSAL TO COMPENSATE VICTIMS OF PROTECTED WITNESSES

House bill 4249 would authorize a $2 million annual appropriation to fund a program to compensate victims of violent crimes committed by federally protected witnesses. The program can be modeled, to a large extent, after compensation programs now in existence in 37 states, the District of Columbia, and the Virgin Islands. Because of the relatively small number of compensable victimizations committed by protected witnesses in a year (25 in fiscal year 1982), the annual cost would be, at most, $2.3 million. This estimate was made without taking two unquantifiable factors into consideration that would likely lower the cost of such a program. One of these factors is the bill's requirement that victims seek compensation from collateral sources (state compensation program) before applying for compensation under this program.

VICTIM COMPENSATION PROGRAMS ARE PREVALENT BELOW THE FEDERAL LEVEL

Victim compensation programs below the federal level have been in effect since California introduced its program in 1965. Since that time, a total of 37 states, the District of Columbia, and the Virgin Islands have established programs to pay benefits to victims of crime. These programs have various characteristics and differ in administrative form, victim eligibility criteria, maximum awards, and funding formulas.[1]

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[1]The information on existing compensation programs presented in this chapter was taken largely from Compensating Victims of Crime: An Analysis of American Programs, prepared for the National Institute of Justice by Abt Associates Inc. and released in July 1983.

Eligibility criteria in
the various jurisdictions

Each jurisdiction has its own set of criteria for inclusion into its victim compensation program, but some requirements and restrictions are more prevalent than others. In every jurisdiction studied, the only losses which are compensable are the out-of-pocket expenses of the victim. If the cost of medical service or time lost from work is covered by insurance or workman's compensation, no compensation is given. In addition, property loss or "pain and suffering" resulting from a victimization are not reimbursed in the great majority of jurisdictions with programs.

A variety of other criteria is taken into consideration by the 39 jurisdictions when granting compensation, including: financial need (12 jurisdictions), minimum loss (24 jurisdictions), victim cooperation with local police and other investigative agencies (34 jurisdictions), residency of victims (14 jurisdictions), and relationship of victim to offender (24 jurisdictions).

Two methods are used to determine which types of crimes are to be compensated. Most jurisdictions (29) work under a general definition of conduct that constitutes a compensable crime. The remaining 10 jurisdictions have a specific compensable crimes list in their victim compensation statute which details exactly which offenses are eligible for compensation. The crimes most often listed on these statutes are: murder, rape, kidnapping, manslaughter, robbery, assault, and battery.

The costs of existing compensation programs are made up of two components--payments to victims and administrative costs. The cost in the jurisdictions in which cost data was available varies considerably. Nine programs cost less than $500,000 annually while three cost over $5 million. Appendix II contains a detailed list of existing programs broken down by total cost, number of claims awarded, average award, and average administrative cost per award.

FEDERAL EFFORT TO COMPENSATE
VICTIMS OF PROTECTED WITNESSES

A bill, H.R. 4249, which passed the House on May 22, 1984, would authorize a $2 million annual appropriation to establish a compensation program for victims of violent crimes committed by protected witnesses. As requested, we developed a range of cost estimates for such a program on the basis of different interpretations of the sample data concerning crimes committed by protected witnesses. In all except our "worst case" estimate, the estimated annual cost for this program was less than the $2 million appropriation proposed in H.R. 4249. In addition, each of these estimates was derived without taking into account two factors which, although unquantifiable, would very likely reduce the federal burden. These factors include the bill's requirement that victims seek compensation from collateral sources, (insurance, workman's compensation, and state victim compensation) prior to applying for federal compensation and the fact that a study has shown that a relatively small number of victimizations will typically meet the statutory criteria for compensation.

Basis for cost estimate

As with the existing compensation programs, the cost to the federal government for this program would be in two categories: benefits paid to victims and administrative costs. To calculate a cost estimate, information on the following three variables is needed:

--number of annual compensable victimizations,

--average award to a victim, and

--administrative cost per award.

Historical cost experience of existing compensation programs provides a good basis for the cost portions of this estimate. However, computing an expected number of victimizations is more difficult because a confident projection cannot be statistically generated from our sample. Therefore, we can only hypothesize about expected annual compensable victimization rates and the array of possible outcomes. We have developed a range of victimization rates with these factors in mind.

The rap sheets we analyzed showed 25 arrests of protected witnesses in fiscal year 1982 for crimes most likely to result

in physical injury to a third party. (Fiscal year 1982 was chosen for analysis because our sample witnesses entered the program during fiscal years 1979 and 1980 and many witnesses might have been in prison during fiscal year 1981.) These crimes include homicide, rape, robbery, kidnapping, assault, and battery. The crimes included in our analysis are similar to those listed by the 10 jurisdictions that maintain a specific crimes list and with the categories of violent crime listed by the Federal Bureau of Investigation in its annual crime report.

To develop our range of three victimization estimates, we first assumed that our 1979 and 1980 sample witnesses committed violent crimes at the same rate as all witnesses who have entered the program. Thus, if our sample of 761 witnesses committed 25 potentially compensable crimes in 1982, all 4,090 witnesses in the program would have committed 134 compensable crimes in the same year.[2] We believe this estimate is a "worst case scenario" because recidivism studies have shown that recidivism rates, while increasing over time, do so at a decreasing rate. Stated differently, prison releasees have a greater chance of being arrested in their first or second year of freedom than they do in their 8th, 9th, or 10th year of freedom.

We are not certain how this recidivism-to-time relationship has impacted on protected witnesses. Therefore, we made the following two additional assumptions that take this relationship into account in varying degrees:

--The compensable crimes committed by our sampled witnesses represent 25 percent of the compensable crimes committed by all witnesses in a year.

--The compensable crimes committed by our sampled witnesses represent 50 percent of the compensable crimes by all witnesses in a year.

Thus, we have developed three assumptions--proportional, 25 percent, and 50 percent--to project the number of victimizations by our sampled witnesses to the total number of protected witnesses. Given our three assumptions, we calculated victimization rates of 134, 100, and 50, respectively.

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[2](4,090/761) x 25 = 134.36

As mentioned earlier, existing compensation program data provides us with a benchmark for generating our range of cost estimates. Appendix II illustrates that the costs vary considerably from jurisdiction to jurisdiction. The average award costs vary from $1,100 in Hawaii to $12,548 in Rhode Island, while the administrative costs per award vary from $197 in Hawaii to $3,524 in Maryland. To compute our estimate, we used both the highest and lowest jurisdictional cost in both categories--$12,548 and $1,100 per award, and $3,524 and $197 administrative cost per award--and have adjusted these costs to 1983 dollars by using the Consumer Price Index. All of the variables put together yield the following results.

Number of compensable victimizations	Highest jurisdictional cost	Lowest jurisdictional cost
134	$2,348,983	$189,561
100	1,752,973	141,463
50	876,486	70,732

Probable cost reduction factors

These cost estimates were computed without taking into account two factors which, most likely, would reduce the federal cost of this proposed program. These variables were not included in the cost estimates because the magnitude of each could vary considerably depending on who is victimized and where. However, in every victimization where either one or both of the following factors applies, the federal cost would be reduced or eliminated.

The first factor is contained in H.R. 4249. The bill would require victims of protected witnesses to seek compensation from collateral sources prior to applying for federal victim compensation. These sources include private insurance claims, workman's compensation, and state or local victim compensation programs. Any compensation derived from these sources would be deducted from the federal claim and may, in fact, eliminate the need for federal compensation for many victims under this program. Essentially, this bill would provide for a victim compensation program of last resort.

A second cost reduction factor not included in our cost estimate relates to the nature of a criminal victimization

itself. Many victims are not eligible for compensation because their injuries, if any, did not require medical attention or result in time lost from work. A study performed for the U.S. Department of Justice found that only 8 percent of all victimizations that involved injury met the necessary criteria for compensation under typical state victim compensation statutes. Taking these additional factors into account, it appears that the costs of this program would likely be less than either the highest estimate we generated--$2.3 million--or the $2 million proposed in H.R. 4249.

MATRIX OF PROGRAM USE BY TYPE OF CRIME AND TYPE OF CRIME GROUP

CRIME / CRIME GROUPS	ONE CRIME BY PERSON OR GROUP	MOTOCYCLE GANG	PRISON GANG	TRADITIONAL ORGANIZED CRIME GROUP	PUBLIC OFFICIAL	UNION OFFICIAL	WHITE COLLAR PROFESSIONAL	OTHER ORGANIZED CRIME GROUP	TOTAL
WEAPONS/EXPLOSIVES	1	1	—	1	—	1	—	4	8
ARSON	4	—	—	5	—	—	—	2	11
MURDER/CONSPIRACY TO COMMIT MURDER	15	2	4	8	1	—	1	5	36
CORRUPTION	—	—	—	—	12	5	—	—	17
RAPE	1	1	—	—	—	—	—	—	2
EXTORTION/ LOANSHARKING	—	1	—	13	1	—	—	—	15
BURGLARY	2	—	—	3	—	—	—	5	10
PROSTITUTION	—	—	—	—	1	—	—	6	7
COUNTERFEITING	1	—	—	—	—	—	—	4	5
ROBBERY	8	1	—	3	—	—	—	8	20
PORNOGRAPHY	—	—	—	1	—	—	—	2	3
DRUG-RELATED	4	3	—	17	2	—	2	59	87
TAX EVASION	—	—	—	4	—	—	—	2	6
INTERSTATE TRANSPORTATION OF STOLEN GOODS	3	—	—	6	—	—	—	7	16
FRAUD/SWINDLES	1	—	—	4	—	—	1	6	12
RICO	—	1	1	4	—	—	—	5	11
GAMBLING	—	—	—	4	—	—	—	—	4
OTHER	1	—	—	1	1	—	—	3	6
TOTAL	41	10	5	74	18	6	4	118	276

COSTS OF VICTIM COMPENSATION PROGRAMS BELOW THE FEDERAL LEVEL

Jurisdiction	Total costs[a]	Average award	Administrative cost per award	Number of claims awarded
Alaska	$ 339,300	$3,500	b	b
California[c]	17,084,579	2,275	b	b
Colorado	b	b	b	b
Connecticut	719,650	2,200	b	b
Delaware	382,154	3,000	$ 905	155
District of Columbia	b	b	b	b
Florida	2,180,000	2,900	1,262	301
Hawaii	509,931	1,100	197	393
Illinois	2,310,900	2,928	b	710
Indiana	b	3,000	b	120
Iowa	b	b	b	b
Kansas	235,025	2,086	746	83
Kentucky[d]	410,533	2,500	b	b
Louisiana	b	b	b	b
Maryland	2,197,753	6,376	3,524	222
Massachusetts[d]	905,679	3,546	b	256
Michigan	1,980,800	1,445	b	b
Minnesota	647,084	b	292	253
Missouri	b	b	b	b
Montana	321,559	1,514	b	b
Nebraska	99,686	1,900	b	35
Nevada	b	b	b	b
New Jersey	2,353,996	3,000	579	691
New Mexico	b	b	b	b
New York	6,832,279	1,948	366	2,952
North Dakota[c]	135,145	1,500	1,039	45
Ohio	9,185,519	4,900	1,239	1,236
Oklahoma	b	b	b	b
Oregon	623,000	1,700	491	212
Pennsylvania	1,068,000	2,600	672	375
Rhode Island	b	12,548	b	19
South Carolina	b	b	b	b
Tennessee[d]	801,452	8,500	b	b
Texas	1,252,068	2,856	763	346
Virgin Islands	137,967	3,696	696	23
Virginia	485,462	2,940	271	202
Washington	2,628,634	2,088	210	1,189
West Virginia	b	b	b	b
Wisconsin	1,400,000	2,600	458	437

Source: Compensating Victims of Crime: An Analysis of American Programs, National Institute of Justice, Department of Justice, July 1983, pp. 184-195.

[a]Except as otherwise noted, these costs are for 12-month periods ranging from July 1979 to December 1981.

[b]Not available.

[c]24-month period.

[d]Excludes administrative costs.

APPENDIX III

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

B-197739

AUG 17 1983

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the
Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

During the hearing conducted by your subcommittee concerning H.R. 3086 on June 22, 1983, some differences arose between our testimony and the Department of Justice's. The differences related to the Federal Bureau of Investigation (FBI) sharing information in its on-line computer network on a protected witness' criminal history with State and local criminal justice agencies requesting this information. We pursued this question with officials of the FBI to reconcile the differences expressed during the hearings. The FBI has reviewed and concurs with the facts contained in this letter. As requested by your office, this letter details the results of our subsequent work.

In our testimony, we stated that because of security concerns, the Department of Justice has not cross-indexed the criminal arrest records of protected witnesses under their old identities to their new identities in the National Crime Information Center's (NCIC) on-line computer criminal history file. Consequently, a check of the NCIC's criminal history file in the new identity of a protected witness would produce a "no-record" response even if the witness had been arrested under his/her old identity. This concerned us because such responses are very likely to be inaccurate. Over the years the Marshals Service has estimated that 95 percent of the protected witnesses have prior criminal backgrounds.

Contrary to our testimony, the Marshals Service's comments on this matter at the hearing implied that a mechanism existed to ensure that law enforcement officials checking NCIC's criminal history file under the new identity of a protected witness

B-197739

will receive a correct response concerning the past criminal activities of that witness. The Marshals Service official stated that if a law enforcement agency requested the criminal history of a witness under the new identity, the requestor would not get an on-line response indicating the witness' past record. Rather, the request would be flagged at FBI headquarters, and the FBI would notify the Marshals Service. The Marshals Service would then advise the FBI to respond to the request. All this would occur within 72 hours of the request. The Marshals Service then stated that on-line requests related to traffic violations and misdemeanors by protected witnesses would not be responded to at all.

In an effort to reconcile these differences, we met with representatives of the FBI responsible for operating its various criminal information systems. We discussed the existing procedures for disseminating a protected witness' criminal record. Essentially, there are two ways to determine whether a person has a criminal record. One is to submit through the mail a fingerprint card or name-check request to the FBI's Identification Division. The second is to make an on-line inquiry of the NCIC's criminal history file--the Interstate Identification Index. According to FBI officials these systems work as follows in relation to protected witnesses.

Regarding the first method, the Justice Department has established a mechanism to provide a protected witness' criminal record identified through a fingerprint or name search to a requesting agency. The FBI has placed flags on the fingerprint cards of protected witnesses in its files. When a fingerprint card or name check is matched to a card with a flag, routine processing is halted and the FBI determines the reason for the flag. If the flag relates to a protected witness, the FBI notifies the Marshals Service of the nature of the inquiry (e.g. an arrest, or employment or licensing matter) and the identity of the inquirer. The Marshals Service then has up to 72 hours to advise the FBI whether to respond routinely (mail the criminal record) or whether the record should be personally delivered by an FBI agent who would caution the recipient on the possible dangers to the witness from uncontrolled disclosure. FBI officials told us they always provide the criminal record when a fingerprint or name match is made on a witness. They said it did not matter whether the request related to a misdemeanor or an employment or licensing check. FBI officials emphasized that

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the credibility of their criminal information system would be undermined if they did not take this approach.

Regarding the second method--querying the Interstate Identification Index--it is important to understand that there have been recent changes in NCIC's criminal history file. The original file was called the Computerized Criminal History (CCH). The CCH file was a centralized on-line data bank established in November 1971. It contained the criminal records for about 2 million individuals. According to the FBI, the criminal records of protected witnesses were excluded from CCH because of security concerns and the fact that it was well known in the criminal justice community that CCH was a limited and incomplete system.

The Index which replaces CCH is a more decentralized system and presently contains information on about 7 million individuals. Basically, the Index will either refer requestors to State(s) having a criminal record for a queried individual or indicate that the person has a record at the FBI. A follow-up request can be made to the appropriate agency to obtain the records. The Index was established by combining records in the CCH file with those in the FBI's Automated Identification Division System. With limited exceptions (e.g. criminals who are subjects of wanted notices or are under parole/probation supervision and instances involving incorrect fingerprint readings), the latter system contains the criminal records of only those persons whose first arrest was on or after July 1, 1974.

In contrast to the CCH file, the FBI made no effort to purge the criminal records of protected witnesses when establishing the Index. FBI officials said the Index includes the criminal records of about 600 protected witnesses. Although they could provide no estimate, FBI officials told us that most of these 600 records would be retrievable only under a protected witness' old identity. They said that records would be cross-indexed between a witness' old and new identity only if two conditions are met--(1) the witness had been arrested under both his/her old and new identity, and (2) the witness' initial arrest (except as noted in the above paragraph) occurred on or after July 1, 1974. Thus, according to FBI officials, the criminal records of almost all witnesses in the program are presently not retrievable from the Index under their new identities.

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FBI officials said that inquiries into NCIC criminal histories are coded by purpose and can be related only to one of the following general reasons: administrative, criminal justice, employment or licensing, and review or challenge of a record. Inquiries made for criminal justice purposes cannot be further broken down as to whether they relate to traffic violations, misdemeanors or felonies.

With regard to notifying the Marshals Service, FBI officials told us that all inquiries of the Index for detailed records are recorded to provide an audit trail on system use as required by law (5 U.S.C. 552(c)). The records disseminated are compared daily with the 600 protected witnesses in the Index. If it is determined that information on a protected witness was disseminated through the Index, the FBI informs the Marshals Service within 24 hours. We were not aware of this comparison and notification procedure at the time of the hearing before your subcommittee.

Our discussion with FBI officials largely substantiates the comments we made before your subcommittee. FBI officials stated that except for a few witnesses, they have not cross-indexed the arrest records of protected witnesses from their old identities to their new identities within NCIC's on-line criminal history file. FBI officials related two reasons for this situation. The first concerns the impact such an action could have on program security. The second involves political concerns that cross-indexing would give the FBI the ability to improperly monitor and conduct surveillance over protected witnesses through its criminal information system.

There is an obvious difference in the Department's basic disclosure policy on sharing a protected witness' criminal record through a name and fingerprint search and through NCIC's on-line criminal history file. The importance of this difference is enhanced with the development and continued growth of the Index because it is a more comprehensive, and thus useful, on-line system than CCH. We plan to continue pursuing the desirability of maintaining an incomplete Index with respect to protected witnesses and to determine whether the Department's concerns can be resolved or mitigated as a part of our review for you.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

(181740)

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REPORT BY THE

Comptroller General

OF THE UNITED STATES

Changes Needed In Witness Security Program

The Witness Security Program was established to protect witnesses from harm as a result of their testimony against individuals involved in organized criminal activity. But program experience has shown that the public also needs protection. In the past, procedural deficiencies have enabled some relocated witnesses to avoid their legal obligations to third parties such as creditors. An internal memorandum issued by the Justice Department in April 1982 will help to alleviate this problem. However, additional changes are needed to better enhance the protection of third party rights while continuing to ensure the safety of witnesses.

This report recommends that the Congress enact legislation which will result in a better balance of public and law enforcement interests and, for the first time, will establish specific criteria to guide the operation of the program. It also recommends that the Attorney General modify procedures to reduce the chances that third party problems will arise.

GAO/GGD-83-25
MARCH 17, 1983

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-197739

The Honorable Max Baucus
United States Senate

Dear Senator Baucus:

This report is the last in a series of three in response to your request, dated September 17, 1979, to examine the operations of the U.S. Marshals Service. This report evaluates operational aspects of the Justice Department's Witness Security Program.

As agreed with your office, unless you publicly announce the contents of the report earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to the Department of Justice, to congressional committees having a jurisdictional interest in the matters discussed, and to other interested parties. Additionally, we will make copies available to others upon request.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT
TO THE HONORABLE MAX BAUCUS
UNITED STATES SENATE

CHANGES NEEDED IN WITNESS
SECURITY PROGRAM

D I G E S T

In 1970, the Congress authorized the Attorney General to protect the lives of persons endangered by their testimony against individuals involved in organized criminal activity. In response, the Attorney General established the Witness Security Program which is administered jointly by the Department of Justice's Criminal Division and the Marshals Service. Over 300 witnesses are admitted to the program annually and yearly program costs total about $28 million. Protection is provided by giving witnesses new identities, relocating them to other communities, and providing them with temporary living allowances until self-sufficiency can be attained through employment or other legitimate means.

Over the years the Witness Security Program has been criticized for inadequate services provided to persons in the program. The Department of Justice, to its credit, has taken steps to address these problems. (See pp. 9 and 10.) However, GAO found:

--Procedural deficiencies had enabled relocated witnesses to avoid legal obligations to the detriment of various third parties. An internal policy change in April 1982, could help to mitigate these problems. However, legislative changes are needed to enhance the rights of third parties to enforce court judgments against witnesses and establish specific criteria to guide the program.

--Program operations cannot be adequately assessed because the program does not have adequate information and procedures to facilitate evaluation.

PROCEDURES NEED TO BE IMPROVED TO PROTECT THE RIGHTS OF THIRD PARTIES

The Witness Security Program is difficult to administer effectively and fairly because of its traumatic effect on the lives of those entering it, the criminal backgrounds of most witnesses, and the inherent conflicts in program goals. As a result, each admission constitutes a high-risk because witnesses may not adjust to their new lifestyles and become law-abiding citizens. When adjustment problems happen, serious consequences can result such as new crimes committed by witnesses.

Prior to April 1982, the Marshals Service advised witnesses when they entered the program that they would not be shielded from the law. In practice, however, the Department would not disclose information on a witness' new identity or location to resolve a civil dispute. This practice acted to shield witnesses from civil obligations whenever the witness refused to comply with a court order. Because the Department refused to disclose this information, third parties could not identify either who and/or where to sue to seek the enforcement of their legal rights. This resulted in:

--Non-relocated parents, who were either separated or divorced, having extreme difficulty in exercising their legally established parental rights with respect to their relocated minor children. In the 10 cases GAO identified, non-relocated parents did not see their children for periods ranging from 2 months to 9 years. In three of these cases, the non-relocated parents were still waiting to be reunited with their children at the time of GAO's review. (See p. 19.)

--Creditors being hindered in their efforts to recover debts owed to them by witnesses. The Marshals Service provided GAO the latest available information which showed that during a 6-month period in 1980, creditors were trying to recover

about $7.3 million from 32 witnesses. Four other witnesses also owed money but the specific amounts could not be determined. Among the creditors were individuals, large companies, and the Federal Government. (See p. 23.)

The former nondisclosure practice adversely affected third parties and put the Department--the Nation's chief law enforcement agency--in the ironic position of being a barrier to law enforcement.

In April 1982, the Department issued an internal memorandum that revised its policy regarding the disclosure of witness information to facilitate the collection of unpaid debts. The memorandum generally outlined the circumstances when the Marshals Service will consider disclosing information on witnesses. The memorandum provides that if the witness does not pay his/her debts or arrange for a payment schedule, the Marshals Service will (1) investigate the creditor to determine if the debt is legitimate, and (2) consult with the Criminal Division, and with its concurrence, advise the witness in writing that he/she has 30 days to make arrangements to satisfy the debt or his/her location will be revealed to the creditor.

GAO believes the Department's actions could help. However, because the memorandum is general in nature and is subject to administrative change, GAO believes that specific legislative criteria need to be established to guide the operation of the program as it relates to third parties.

In addition, because the internal memorandum still provides for the Department to make the ultimate decision on disclosure, GAO believes that overall public interests would be better served if third parties had the opportunity to seek a judicial review of the facts that support the propriety of the Department's

nondisclosure decision. This would promote a more objective application of disclosure criteria but still provide for nondisclosure in appropriate circumstances. GAO also believes that additional administrative changes can reduce the chances that third party problems will arise and ultimately the need to make disclosure decisions. (See p. 27.)

PROGRAM EVALUATION HAS NOT OCCURRED

Although the program has cost over $100 million since its inception in 1970 and has been subject to frequent criticism, a system for gathering information on program operations and results has not been fully established. Additionally, procedures to facilitate an independent evaluation of the program have not been established. These shortcomings impede an adequate assessment of the program. In view of the cost and controversial nature of the program, GAO believes the time for an information system and a mechanism to facilitate independent evaluation is overdue. (See p. 39.)

RECOMMENDATIONS TO THE CONGRESS

GAO recommends that the Congress enact legislation that requires the Attorney General to disclose a witness' identity to a third party possessing a court judgment against the witness unless available evidence indicates that (1) the disclosure could likely result in harm to the witness or (2) the witness does not have the ability (financial or otherwise) to resolve the judgment. The legislation should also provide, among other things, third parties the right to petition a Federal court to review the propriety of a nondisclosure decision. (See p. 32 and app. III.)

RECOMMENDATIONS TO THE ATTORNEY GENERAL

GAO recommends that the Attorney General modify program policies and procedures to reduce the chances of third party problems arising when it relocates witnesses by (1) informing witnesses of the disclosure policy and (2) offering all witnesses the opportunity and necessary assistance to safely litigate civil matters. (See p. 33.)

GAO also recommends that the Attorney General develop an information system and procedures to allow for appropriate evaluation of the program. (See p. 43.)

AGENCY COMMENTS AND GAO'S EVALUATION

The Department of Justice agreed with all of GAO's recommendations to the Attorney General but disagreed with one element of GAO's recommendations to the Congress. The Department did not agree that third parties should be provided the right to seek judicial review of nondisclosure decisions by the Attorney General. The Department said, among other things, that the GAO recommendation could involve it in unnecessary and lengthy litigation and that existing statutes already provide third parties with adequate avenues of judicial review.

The statutes cited by the Department do not provide third parties with adequate avenues of judicial review. Therefore, GAO believes that the Congress should establish a mechanism for judicial review that would give fair recognition to the Department's interest in maintaining the safety of witnesses and the viability of the program while also enhancing the ability of third parties to pursue their legal interests. Such review would concern only whether or not the Government should remove the barrier (a secret identity and location) that it has created to protect the witness.

Thus, when viewed in conjunction with the Department's initiatives to better recognize third party rights, GAO believes that there would be a limited need for further litigation. (See pp. 33 to 38.)

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CHAPTER 1

INTRODUCTION

At the request of Senator Max Baucus, we examined the operations of the Marshals Service and U.S. marshals. (See app. I.) This report, the last in a series of three resulting from this request, concerns the operation of the Marshals Service's Witness Security Program. The first report, "U.S. Marshals' Dilemma: Serving Two Branches of Government" (GGD-82-3, April 19, 1982), dealt with the difficulties stemming from the organizational relationship of U.S. marshals to the Federal judiciary and the Attorney General. The second report, "U.S. Marshals Can Serve Civil Process and Transport Prisoners More Efficiently" (GGD-82-8, April 22, 1982), discussed the opportunities that exist to enhance the efficiency of serving civil process 1/ and transporting Federal prisoners.

THE POSITION OF U.S. MARSHAL AND ITS RELATIONSHIP TO THE FEDERAL COURTS AND THE DEPARTMENT OF JUSTICE

The Judiciary Act of 1789 (1 Stat. 73,87) established the position of U.S. marshal as an executive branch officer to assist the courts. The Judiciary Act directed marshals to (1) attend sessions of the Federal courts and (2) execute all process and orders directed to them. The act also authorized marshals to command all assistance necessary to execute their duties. Six years later, the Congress vested marshals with the same enforcement powers as State sheriffs when executing the laws of the United States. With this legislation, U.S. marshals became the first Federal law enforcement officers.

Until 1861, U.S. marshals were largely independent from the direction of executive branch agencies. However, in that year the Congress enacted legislation (ch. 37, 12 Stat. 285) that made marshals subject to the direction and supervision of the Attorney General. For many years the relationship between the Attorney General and marshals was casual in its nature rather than one where the Attorney General actively exercised control. As a practical matter, U.S. marshals remained basically autonomous from day-to-day direction by the Attorney General until 1969.

1/"Process" is a general term for a mandate or writ used by the court to notify a party that an action against them has been commenced, to compel appearance of an individual, or to force compliance with a judicial order.

In 1969, the Attorney General formalized his relationship with U.S. marshals by establishing the Office of the Director, Marshals Service. The Marshals Service is a bureau within the Department of Justice. As officers of the Department of Justice, marshals are supervised and directed by the Attorney General through the Director of the Marshals Service and are assigned responsibility for law enforcement program areas of national priority. These program areas primarily include the Witness Security Program and the Fugitive Warrants Program. Although marshals are officers of the Department of Justice, they remain officers and instrumentalities of the Federal courts. They are required by law to attend court when ordered by a judge. They assist court operations by transporting and producing prisoners as needed, serving process, executing various commands of the court, and providing security to the court.

The President appoints a marshal, subject to Senate confirmation, for all of the Federal judicial districts except the Virgin Islands, whose marshal is appointed by the Attorney General. There is at least one marshal's office located in each of the 50 States, the District of Columbia, the Virgin Islands, Puerto Rico, Guam, and the Northern Mariana Islands. In all there are 93 U.S. marshals to serve the 94 Federal judicial districts. The marshal for the district of Guam is also responsible for serving the district court for the Northern Mariana Islands.

The President appoints the Attorney General, subject to Senate confirmation. The Attorney General in turn appoints the Director, Marshals Service. Deputy marshals are career civil servants and are hired from Federal employment registers maintained by the Office of Personnel Management. As of August 1982, the Marshals Service had 2,018 employees, of which 1,529 were deputy marshals. The Marshals Service has assigned 240 deputy marshals and 18 support personnel to operate the Witness Security Program.

The Office of Enforcement Operations, a component of the Department's Criminal Division, shares responsibility with the Marshals Service for managing the Witness Security Program. It has no direct authority over U.S. marshals. It does, however, make decisions regarding the conduct of the Witness Security Program. In making program-related decisions, it can directly affect the application and use of marshal resources.

OBJECTIVES, SCOPE, AND METHODOLOGY

Senator Max Baucus' request asked for an evaluation of several Marshals Service functions. In accordance with discussions with his office, questions 2 and 5 (see p. 45) were not pursued because preliminary information indicated no further review was warranted. To address the remaining five questions, our review focused on the following objectives: (1) how U.S. marshals' ability to accomplish their missions and utilize resources is affected by their being subject to control by two branches of Government; (2) what can be done to improve the efficiency of prisoner transportation between judicial districts and the service of civil process; and (3) how effectively the Marshals Service handles the Witness Security Program. This report deals with the third objective. Objectives (1) and (2) were discussed in the two prior reports. (See p. 1.)

We narrowed the scope of our review of the Witness Security Program to two basic issues--the problems that third parties encounter in attempting to enforce civil obligations against protected witnesses and fundamental program management. The narrowing of our audit scope was done with the consent of Senator Max Baucus' office because of the number of separate and complex issues being covered by our overall review and the audit arrangements the Department established for us. These arrangements enabled us to examine program operations without disclosing the identity of witnesses. However, the arrangements required program personnel to spend considerable time collecting requested information, copying numerous documents for our examination, and excising the names and locations of witnesses to protect their security. We believed that an overall examination of program operations under these circumstances would have seriously disrupted operations. Therefore, with the concurrence of Senator Max Baucus' office, we decided to focus on two areas where we believed problems were longstanding and serious.

This review was performed in accordance with generally accepted Government auditing standards. In reviewing the Witness Security Program, we conducted detailed audit work at the Marshals Service's headquarters in McLean, Virginia, and at the Office of Enforcement Operations, Criminal Division in Washington, D.C. during the period June 1980 to October 1982. In addition, we did limited audit work in 10 Federal judicial districts--eastern Virginia, Maryland, southern Ohio, eastern Kentucky, eastern Louisiana, southern Texas, central California, western North Carolina, southern California and southern Florida.

To accomplish our objective, we

--reviewed Federal laws, rules, and regulations governing the Witness Security Program and the establishment of the position of U.S. marshal and the Marshals Service;

--interviewed officials of the Marshals Service and Office of Enforcement Operations about the management and conduct of the Witness Security Program;

--reviewed the policies and procedures for operating the Witness Security Program;

--reviewed congressional hearings concerning the Witness Security Program;

--interviewed U.S. marshals, program personnel, U.S. attorney personnel, organized crime strike force attorneys, agents of the Drug Enforcement Administration and the Federal Bureau of Investigation, and Federal probation officials concerning their experiences, perceptions, and use of the program;

--conducted computer-assisted information searches and literary searches to identify and obtain court cases, news accounts, and books relating to the Witness Security Program (see p. 47);

--discussed the operations of the program with relocated witnesses who personally contacted us;

--assembled and evaluated overall management statistics related to program operations;

--evaluated specific case-related correspondence and documents provided to us by the Marshals Service and the Office of Enforcement Operations which primarily concerned (1) program use, (2) services provided to witnesses, (3) complaints by various third parties (e.g. creditors of relocated witnesses), (4) the reasons for multiple relocations of protected witnesses, and (5) recommendations for admissions to the program on the basis of preliminary interviews of witnesses; and

--examined documents that were gathered by the staff of the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, in preparation for hearings on the Witness Security Program that were held in December 1980.

CHAPTER 2

WITNESS SECURITY PROGRAM:

ITS EVOLUTION AND OPERATION

Except when testimony is protected by recognized constitutional or statutory rights and privileges (e.g. self-incrimination or husband/wife rights), every citizen has the duty of testifying in court to aid the enforcement of law. Not even the threat of death is a legal excuse from this duty (Piemonte v. United States, 367 U.S. 556, 559)(1960). However, the fear of reprisal or retaliation can cause potential witnesses to ignore this duty. This led the Congress to conclude that Federal law enforcement efforts would be enhanced if witnesses could be assured that they and their families would not be harmed as a result of their testimony in criminal proceedings. On October 15, 1970, the Congress formally authorized the Attorney General in Title V of the Organized Crime Control Act of 1970 (Public Law 91-452) to protect the lives of witnesses who testify against persons involved in organized criminal activity.

As a result, the Attorney General created a formal program to protect witnesses--the Witness Security Program. Program administration, usage, costs, and the methods used to protect witnesses have evolved since the program's inception. These changes have been spurred by several factors, including adverse operating experiences and the considerable controversy caused by the program.

THE EVOLUTION OF WITNESS PROTECTION

Before the Witness Security Program was established, witnesses were protected on an ad hoc basis. Police officers, investigative agents, and prosecutors periodically aided witnesses whose cooperation with the Government placed them in jeopardy. The assistance varied and included arranging for relocation to a new residence, assisting in establishing a new identity, or obtaining employment. Often, the assistance was little more than a bus ticket to some distant location.

In the late 1960's, the Congress became concerned about the increased influx of "organized crime" into both illegal and legal segments of society. Congressional hearings disclosed that organized crime groups were known to have murdered, tortured, and threatened witnesses. Law enforcement officials testified that this situation was hampering prosecutions and deterring witnesses from cooperating with law enforcement agencies.

The congressional hearings led to the passage of the Organized Crime Control Act of 1970. The purpose of the act was to seek the eradication of organized crime by strengthening the legal tools used in the evidence gathering process. A new tool was added under Title V of the act. Title V authorized the Attorney General to provide security to persons (and their families) intended to be called as Government witnesses in proceedings (including State trials) instituted against any person alleged to have participated in organized criminal activity.

The Witness Security Program was established to implement Title V. Since its establishment 12 years ago, many changes have occurred in the administration, usage, overall cost and size of the program, and manner in which witnesses are protected.

Initially, the Department's Criminal Division was responsible for protecting witnesses, and the Marshals Service's role was limited to supplying guards when a need for physical protection arose. However, program administration soon became burdensome for the Criminal Division, and questions arose about the appearance of impropriety associated with prosecuting attorneys securing money for witnesses. Therefore, in March 1971, a major administrative change occurred. The Marshals Service was tasked with the primary responsibility for administering and operating the program while the various operating units of the Criminal Division retained the authority to determine program admissions.

The types of cases investigated and prosecuted with the assistance of protected witnesses have changed over the years. Initially, the program was intended to protect witnesses testifying against persons allegedly engaged in organized criminal activity. Indeed, during the early years most witnesses admitted to the program were sponsored by the Criminal Division's Organized Crime and Racketeering Section--the Department's focal point for coordinating enforcement activities against organized crime. As time passed, however, the number of witnesses sponsored by other departmental units increased, and the prosecutive priorities of the Department changed.

To determine in what types of cases protected witnesses were predominantly being used; we randomly selected 103 of the 557 witnesses admitted to the program between January 1979 and July 1980. At our request the Office of Enforcement Operations provided us with case-related information for 98 of the 103 witnesses we selected. 2/ The following table shows that a variety of cases are being prosecuted using protected witnesses.

2/The Office of Enforcement Operations could not locate the other five case files we requested.

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Type of case (note a)	Number of witnesses
Narcotics	26
Major organized crime groups	22
Other organized crime groups	16
Murder	14
Theft	7
Public corruption	5
Alien smuggling	3
Arson	2
White-collar crime	1
Conspiracy to commit murder	1
Prostitution	1
Total	98

a/As a representative sample of the universe, this sample had a confidence level of 95 percent and a sampling error rate of ± 10.1 percent.

The basic concept of how to protect witnesses has also changed since the program's inception. At first, witnesses were protected in secured facilities (safehouses) during the period they were in danger. According to the Marshals Service, operating experience showed that safehouses were not well-suited to the realities of protecting individuals. The location of safehouses was often inadvertently disclosed; they were unappealing for individuals who were not in custody or had families; and they were becoming prohibitively expensive to operate. For these reasons, the safehouse approach to protecting witnesses was discontinued.

The Marshals Service provides long-term protection currently by giving witnesses new identities with supporting documentation (e.g. birth certificate and social security card). Further, it relocates them to areas free from the criminal element they testified against and provides them with a temporary living subsistence until they can achieve self-sufficiency. The Marshals Service also provides or arranges for other types of social services based on individual needs such as employment assistance, resume preparation, emergency medical treatment, and psychiatric counseling services. All of this is done in hopes that the witness will become successfully established in his/her new community as a law-abiding citizen.

There has been a significant increase in the usage and, thus, the overall cost of the program. At the time Title V was enacted, management and budget estimates anticipated between 25 and 50

witnesses would be protected each year at a cost of less than $1 million. However, over 4,000 witnesses and over 8,000 family members have entered the program since its inception. Annual program costs are currently about $28 million. The following chart, provided by the Marshals Service, depicts the yearly size and cost of the program.

Fiscal year	Witnesses admitted	Program costs (note a)
		(millions)
Beginning of program through 1973	647	(b)
1974	324	$ 3.1
1975	371	11.4
1976	466	12.6
1977	469	12.0
1978	441	11.6
1979	427	19.9
1980	c/334	21.5
1981	287	24.4
1982	324	28.4

a/Yearly costs are comprised of employee salaries and expenses and financial maintenance expenses incurred for both newly admitted and reactivated witnesses and their family members.

b/Program costs were not available for this period.

c/The decrease in admissions resulted from Justice Department efforts to improve program administration.

Even though the number of witnesses admitted to the program each year has decreased recently, program costs have increased because of inflationary pressures and the fact that many witnesses and family members receive benefits subsequent to their initial relocation and subsistence. For example, in fiscal year 1982, 324 new witnesses were admitted to the program, but the Marshals Service provided services (protection and/or funding) to about 470 witnesses per month. In addition, because the Department recognizes a lifelong commitment to protect the lives of witnesses, there is an increased number of witnesses who may eventually need further assistance. For example, in fiscal year 1982, 74 witnesses, whose subsistence had terminated, were reactivated for funding because of a variety of reasons. These included breaches in witnesses' security and attempts to resolve problems with their dissatisfaction over their relocation area. Each time a witness is reinstated, additional expenses (e.g. subsistence, transportation, new documentation, and/or relocation) are incurred.

Actual program costs extend beyond the amounts appropriated to the Marshals Service. Other Government agencies incur expenses while assisting the Marshals Service in providing services to witnesses. Among these are the Immigration and Naturalization Service, the Veterans Administration, the Social Security Administration, the Department of Defense, as well as numerous State and local governments which cooperate with program administrators by providing services to witnesses and/or documents for identification.

A significant factor that has contributed to the changes in the Witness Security Program has been the controversy surrounding its operation. The program has been the subject of numerous critical newspaper and magazine articles, books, and television reports. Additionally, the program was extensively reviewed by a special Justice Department committee and was the subject of major congressional oversight hearings in 1978 and 1980. (See p. 47.)

In response to criticism of the program, the Department established in July 1977 the Witness Security Program Review Committee to assess the program and to make recommendations to improve it. 3/ The review committee looked at a number of issues including (1) program purpose and evolution, (2) admission standards and procedures, (3) program services, (4) administrative practices, and (5) program costs. The review committee concluded in early 1978 that the program had been successful in providing protection to witnesses and that there was a continuing need for the program. On the other hand, the review committee also found significant deficiencies in the program and made 28 recommendations to improve its operation. Some of the more significant deficiencies and the corrective actions taken by the Department follow.

--The program was used too extensively. As a result, the Marshals Service's limited resources could not meet witnesses' needs. In response, the Department revised the program's admission standards and established targets for the number of witnesses to be admitted each year. This reduced new admissions substantially.

3/At about the same time, the former Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, expressed similar concerns about the program's responsiveness to witnesses' needs and offered suggestions for improvement. The suggestions of the Subcommittee and its staff, combined with the results of the Department's internal review committee, played an important role in revising the Witness Security Program.

--The decentralized admission process was characterized by inadequate screening and inconsistent admission standards. This reduced opportunities to make an objective judgment about the value of a witness' testimony in relation to the potential cost of admitting the witness into the program. In response, the Department centralized the admission decision-making process in the Office of Enforcement Operations.

--Too many witnesses were accepted under emergency entry procedures which prevented careful screening of witnesses. Consequently, for these witnesses, the Marshals Service had little information on their backgrounds and needs. This situation also placed undue strain on witnesses and their families and increased the overall level of tension and frustration for everyone involved with the program. In response, the Department, through better planning, has been able to reduce the number of emergency admissions.

--Services provided to witnesses were deficient. The major complaints involved employment assistance and the provision of documentation to support new identities. In addition, the Department's specific obligations to provide services were not being made clear to witnesses. In response, the Department now requires all witnesses to sign a Memorandum of Understanding before admission to the program. This memorandum explains the program to witnesses and clarifies the Government's obligations and responsibilities. The Marshals Service has also established agreements with various groups to assist with employment efforts and has attempted to improve the timeliness of its documentation services.

--There were administrative deficiencies including understaffing, insufficiently trained personnel, and poorly organized and incomplete program files. The Department has increased the amount of resources devoted to the program, trained and promoted personnel to conduct program operations, and improved its program files and records.

--Finally, the program's overall prosecutive results and societal impacts have never been evaluated. Recently, the Office of Enforcement Operations began collecting information so that it can better examine program benefits. However, the impacts of the program are still not examined in a routine and comprehensive manner. This weakness is discussed in chapter 4 of this report.

WITNESS SECURITY: HOW IT IS PROVIDED

As mentioned on pages 1 and 2, two entities within the Department of Justice control the operation of the program. The Office of Enforcement Operations is responsible for determining whether a witness is eligible for admission into the program, for coordinating the appearance of the witness for testimony, and for resolving differences between witnesses, marshals, investigators, and attorneys. 4/ The other entity, the Marshals Service, is responsible for the day-to-day operation of the program. This includes overall responsibility for protecting the witness and his/her family, providing documentation, employment, and housing assistance, and conducting program administrative functions such as preparing internal management reports.

To place a witness in the program requires action by a number of parties. First the prosecuting attorney must transmit an admission request to Enforcement Operations. The request, among other things, attempts to delineate the significance of the case and the expected testimony from the prospective witness. After receiving the request (1) the appropriate investigative agency (e.g. Federal Bureau of Investigation) is required to submit a report concerning the threat to the witness' life; (2) the appropriate Criminal Division unit (e.g. Narcotic and Dangerous Drug Section, Public Integrity Section) is asked to review and comment on the specific case; and (3) the Marshals Service is asked to conduct a preliminary interview with the witness and his/her family.

At the preliminary interview, a trained deputy marshal explains the program to the potential witness and details what will be expected of the witness if he/she is accepted into the program. After the interview, the deputy marshal transmits a recommendation to the Marshals Service on whether or not the witness will be a workable case. The Marshals Service then makes its own admission recommendation to Enforcement Operations. Generally, Enforcement Operations will make its final decision on admittance only after it has received and reviewed the threat assessment, the Criminal Division unit's comments, and the Marshals Service's preliminary interview recommendation.

4/This office also has other duties not directly related to the program which include overseeing the use of court-approved wiretaps and approving requests for consensual electronic monitoring (the recording of a conversation where at least one party consents to be overheard).

If Enforcement Operations admits the witness into the program, he/she is given a Memorandum of Understanding to read. The memorandum describes the obligations of both the Marshals Service and the witness under the program. Each page of the memorandum (there are over 20 pages) is to be initialed by all adult family members to indicate their understanding and concurrence.

After the memorandum is signed the Marshals Service becomes almost entirely responsible for protecting the witness and other family members and providing for their day-to-day needs. A case manager at Marshals Service headquarters is assigned responsibility for coordinating all services to be provided to witnesses. At this time, moving arrangements will be made and efforts to obtain a legal name change and supporting documentation will begin. A relocation area (which is approved at Marshals Service headquarters) will also be chosen on the basis of the security needs of the witness and family, availability of employment opportunities, and if possible, the personal preference of the witness.

A deputy marshal in the relocation area will become the witness' primary point of contact with the Marshals Service. This deputy marshal will be responsible for providing services such as housing and employment assistance, routine medical care, and other services which cannot be provided by the headquarters staff.

After relocation, witnesses and their families are provided documentation to support their new identities. Typically, this involves a legal name change, a driver's license, and a social security card. It may also involve, in appropriate cases, the provision of professional licenses, birth certificates, school records, medical records, passports, religious records, and Department of Defense and Veterans Administration records. Witnesses are provided only documentation that is commensurate with their past lives and experiences. In other words, witnesses will not be given documentation indicating they earned a college degree or professional certificate unless it was earned under their former identity.

In accordance with the Memorandum of Understanding, the Marshals Service will provide a witness with one "reasonable" job opportunity commensurate with his/her skills or abilities. If the witness refuses to accept the "reasonable" job offer, subsistence funding can be terminated. To help find employment for witnesses, the Marshals Service has established a national job bank comprised of companies or agencies that have agreed to assist in hiring witnesses. The deputy marshal in the relocation area can utilize this job bank or can work independently to help assist the witness to find employment. The Marshals Service will also assist the witness in preparing a "sanitized" employment resume. This resume lists a witness' employment experience and the type of

company worked for but does not identify the company or its location.

Witnesses and their families are paid a monthly subsistence allowance during the period in which employment is being sought. The allowance is established on the basis of a sliding scale depending on the number of dependents the witness has and the geographic location to which the witness is relocated. The Memorandum of Understanding states that a witness' subsistence allowance may be terminated (without cause) after 6 months, or for other appropriate reasons (e.g., failing to abide by program rules). According to the Marshals Service, the average time a witness receives subsistence is about 18 months. After a witness leaves the subsistence stage of the program, the Marshals Service basically loses contact with the witness and will become involved again only if the witness contacts the Marshals Service or if third parties (other law enforcement groups, creditors, etc.) learn of the witness' participation in the program and seek assistance from the Marshals Service.

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The previous reviews of the Witness Security Program by the Department and congressional subcommittees have focused largely on the problems that witnesses experience in receiving program services. As discussed above, the Department and the Marshals Service have responded by making a number of changes to improve program administration and operations. Our work indicates that the changes have had positive effects even though they have not fully eliminated all problems. For example, witnesses now get more documentation supporting their new identities and get it sooner; however, in some instances, witnesses may not get their birth certificates or social security documents and benefits in a timely fashion. These concerns and delays continue to exist primarily because the Marshals Service must rely on other agencies for assistance in providing services to witnesses.

This report does not deal extensively with the provision of program services to witnesses. Rather, it concerns (1) problems that third parties have encountered in attempting to enforce civil obligations against protected witnesses and (2) factors that hinder program management.

CHAPTER 3

RELOCATED WITNESSES OFTEN AVOID CIVIL OBLIGATIONS

The Witness Security Program is a difficult program to administer effectively and fairly because of its traumatic effect on those who enter the program, the criminal background of most witnesses, and the inherent conflicts in program goals. As a result each use of the program is a high-risk because no one knows whether a witness will successfully adjust to his/her new identity and become a law-abiding citizen.

Whenever problems arise, they can have serious consequences. Over the years witnesses have been able to use their secret new identities and locations to avoid debts and rulings of various courts directed against them. Until April 1982, the Department did not balance the need to protect witnesses with the need to protect various third parties from the unscrupulous actions of witnesses. As a result, separated or divorced non-relocated parents were unable to exercise their court established custody or visitation rights with their relocated children, and creditors were precluded from collecting debts owed to them by witnesses.

In April 1982, the Department issued an internal memorandum that addressed the problems between witnesses and third parties. The memorandum now allows the Marshals Service to consider, on a case-by-case basis, whether it should disclose a witness' identity and location to enable third parties to seek enforcement of their legal rights. Disclosure, however, may occur only after a number of prerequisite determinations have been made. While this is a significant change and represents a good faith effort by the Department, we believe specific legislative requirements are needed to better enhance the ability of third parties to enforce judgments against witnesses.

In addition to the Department's action in April 1982 there has been increased congressional attention to this matter. During the 97th Congress, three bills were introduced that contained provisions affecting the Witness Security Program and the resolution of third party problems. In general, these bills were very similar to the Department's new procedure in that disclosure of a witness' new identity and location could be considered only after a number of prerequisite conditions have been satisfied. Even though the Department has revised its policy, we believe legislative changes need to be made to better balance the interests of third parties while maintaining the security of the program. The Department also needs to further modify its policies and procedures.

RELOCATING KNOWN CRIMINALS
AND REESTABLISHING THEIR LIVES
IS A HIGH-RISK

A number of factors make the Witness Security Program difficult to administer and hinder the chances that relocated witnesses will achieve a basic program objective--to successfully establish themselves in their new communities as law-abiding citizens. The program's basic operating concept--relocation under a new identity while leaving behind all previous ties--is traumatic. Further, inherent conflicts exist in this concept. For instance, witnesses are assisted in finding employment but verifiable employment references cannot be given because this action would conflict with the goal of keeping a relocated witness' identity and location secret. Finally, the Marshals Service's job is further complicated by the fact that most relocated witnesses have criminal backgrounds, limited education, and often do not have marketable job skills.

The trauma derives from the basic method of providing protection. Relocating and changing the names of persons in the program forces them to totally restructure their lives. Under the program, witnesses and their families must break all direct contact with non-relocated family members, past friends, and associates. Any subsequent communication with these individuals is to be made only in a secure manner, such as through the Marshals Service by using a central post office box. This prevents disclosure of the witnesses' new locations. The trauma is compounded because witnesses must often be evasive about their pasts in the course of establishing friendships and business associations in their new locations and face a never-ending fear that someone from their past might recognize them and cause them harm.

Inherent conflicts also exist in basic program goals. The need to keep a witness' new identity and location secret creates problems in helping a witness establish a new life. For example, witnesses must attempt to obtain employment in their new locations. However, to protect their identities they cannot provide prospective employers with any verifiable employment references. If such references were provided and checked, a link between the witnesses' past and their new identities could be established. Relocated witnesses encounter this same problem in trying to establish credit.

These conditions would make the program difficult for the Marshals Service to administer under the best of circumstances. However, the Marshals Service usually does not encounter the best circumstances. Most persons admitted to the Witness Security Program (about 95 percent according to the Marshals Service) have

criminal backgrounds. This not only creates additional problems in obtaining employment and credit for relocated witnesses; it requires the Marshals Service to be especially careful in its assistance efforts. For instance, Marshals Service officials have stated that one reason they do not give witnesses extensive background documentation or transfer credit histories is the fear of potential liability to the Government if the documentation is used for fraudulent purposes by witnesses.

Finally, the Marshals Service's efforts to assist witnesses in obtaining employment are complicated by the fact that witnesses often have limited job skills and many have limited education. In April 1982, the Marshals Service provided us with the latest available data on the education and job skills for 146 of the 287 witnesses admitted to the program during fiscal year 1981. As shown in the following table, 59.2 percent of the labor skills witnesses claimed to possess were of an unskilled nature, and 34.2 percent of the witnesses had not completed high school. 5/

Job skills	Percent	Education	Percent
Unskilled labor	59.2	Did not complete high school	34.2
Skilled labor/ craftsman	16.7	Completed high school	43.2
Office-related	4.2	Some college	16.4
Managerial	14.1	College degree	4.8
Skills indicating college training	5.8	Advanced/professional degree	.7
		Unknown	.7

All of these factors combine to make each use of the Witness Security Program a high-risk from the standpoint of whether relocated witnesses will be able to successfully adjust their lives and become law-abiding citizens under their new identities. In reality, witnesses do not always achieve this goal. As stated on page 4, we reviewed many different types of program-related information. In doing so, it was not uncommon to identify instances where witnesses had committed or allegedly committed crimes after

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5/Bureau of the Census educational data (for 1980) indicates that 19.6 percent of the Nation's population in age groups comparable to those of relocated witnesses did not complete high school.

being relocated. Some of these were of an extremely serious nature. For instance, we identified seven witnesses who have been convicted of murder, one who is currently charged with murder, and indications that four others were involved in murders. Other serious crimes committed by witnesses include arson, robbery, and assorted drug violations.

The Department did not effectively track criminal arrests of protected witnesses at the time of our fieldwork. Although the Marshals Service had attempted to establish an "arrest log," the log was not very useful because it was not consistently prepared or maintained. Its condition prevented any meaningful determination of the number of witnesses arrested or convicted. Two studies to assess the extent of criminal activity by relocated witnesses have been conducted in the past 5 years. In 1978, the Witness Security Program Review Committee, as a portion of its overall evaluation of the program, reported that 15 percent of a sample of 200 witnesses admitted between 1970 and 1977 had been arrested at least once since their entry into the program. In fiscal year 1982, the Marshals Service reviewed the files of the last 1,174 witnesses entering the program from October 1978 to April 1982 and found that about 17 percent of the nonprisoner witnesses had been arrested since their admission. These studies do not represent all the legal problems caused by the relocation of witnesses. Neither study adequately addresses adverse impacts created by witnesses who have failed to satisfy civil obligations or debts or who fail to respond to court orders.

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In commenting on our draft report, by letter dated December 10, 1982, the Department discussed actions it has taken, as well as several of its current policies, to safeguard the public from the criminal and unscrupulous actions of witnesses. (See app. IV.)

First, the Department said that the Marshals Service has instituted a program whereby all prospective witnesses are administered a battery of tests which evaluate each witness' vocational interests and general temperament, including potential antisocial behavior. These tests, which are evaluated by a team of vocational/behavioral psychologists, are envisioned to be helpful in finding employment for witnesses and in predicting possible adjustment problems.

Second, the Department stated that its policy is to (1) assist other law enforcement agencies in any legitimate investigation of criminal activity by witnesses and (2) fully advise prospective employers of witnesses of the nature and extent of the witnesses' criminal background. Further, it has reached agreement with the Probation Division of the Administrative Office

of the U.S. Courts and the U.S. Parole Commission to provide for the supervision of all Federal probationers and parolees in the Witness Security Program. It also stated that it supported legislation during the 97th Congress that would have required all State parolees and probationers admitted to the program to be supervised. Although, we did not examine these new initiatives, we believe they represent an affirmative effort by the Marshals Service to improve program operations in light of the criminal nature of some witnesses and the problems they have caused.

PROCEDURES NEED TO BE IMPROVED TO PROTECT THIRD PARTY RIGHTS

A longstanding problem that has been encountered in the conduct of the Witness Security Program is the frequency with which third parties have encountered difficulties when attempting to enforce judgments against relocated witnesses. Until April 1982, the Department had not attempted to establish adequate measures to deal with this problem. As a result, third parties have been adversely affected.

As discussed on page 12, the Memorandum of Understanding between the witnesses and the Marshals Service delineates basic program policies and the various obligations of the witnesses and the Government. The memorandum identifies two principles the Department attempts to balance: the need to protect witnesses from physical harm resulting from their testimony and the need to protect the public from the unscrupulous actions of some witnesses. These principles must be carefully balanced because they can and do conflict with each other at various times.

First, the memorandum advises witnesses that security assistance provided by the Marshals Service is continuing in nature and that they must share responsibility with the Marshals Service to maintain their security. It states that all future security problems should be brought to the attention of the Marshals Service for evaluation. Thus, even though subsistence payments might be finished from a security viewpoint the Department recognizes a lifelong commitment to protect the lives of witnesses.

Second, the memorandum contains several specific policies designed to protect third parties after witnesses are relocated. The memorandum requires witnesses to list all of their outstanding debts and liens and court orders issued against them. It advises witnesses that they are responsible for settling their own debts and that the Marshals Service will not shield them from the law or legitimate creditors. The memorandum advises witnesses that the Marshals Service will serve them with legal process (summonses, subpoenas, court orders, etc.) on behalf of third parties. It

also states that court orders which grant custody of minor children to persons other than the witness will be honored, and children will not be relocated in violation of these orders. Finally, the memorandum states that witnesses' subsistence funding can be terminated if they fail to follow program rules.

The policies to protect third parties conflict with the principle of lifelong security whenever relocated witnesses do not comply with court judgments served them by the Marshals Service. This occurs because until April 1982, program procedures relied heavily on the integrity and cooperation of witnesses and did not call for active involvement by the Marshals Service in trying to resolve problems caused by the relocation of witnesses. The most severe program sanction mentioned in the memorandum--termination of subsistence funding--is ineffective whenever a witness' funding has already been terminated or when the possible penalty (debt or court judgment) exceeds the value of subsistence. It had been the Department's policy not to disclose the identity or location of witnesses to permit third parties to pursue the resolution of civil disputes in accordance with the due process of law even when witnesses ignored court judgments directed against them. This action, in effect, shielded some witnesses from civil obligations and creditors. In the past this has resulted in the following:

--Separated or divorced parents, who are not relocated, encounter hardships when trying to enforce their legally established parental rights against the relocated parent.

--Third party creditors suffer substantial financial harm because they are being hindered in their ability to collect debts from witnesses.

Parent/child relationships have been seriously disrupted

In the past the Department did not aggressively attempt to identify or resolve problems that arise whenever a divorced or separated parent with minor children is admitted to the Witness Security Program. Rather, it relied largely on the relocated parent to settle his/her own domestic matters. By not taking appropriate actions, the Department perpetuated problems for the concerned parents and children.

Matters related to domestic relations between husband and wife and parent and child are governed by the laws of the States. Disputes that may arise between concerned parties about these relationships are addressed by State courts. In congressional testimony the Department has recognized both the serious nature of parent/child relationship problems created by the program and the principle that these matters are properly resolved at the State

court level. In 1978, the Director of the Marshals Service told the former Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, that

> "You would have to certainly work to secure some accommodations so the rights of the other party are protected. I don't think we would ever want to be in a posture of telling one parent: We have relocated your children; you are just out of luck forever. I think that would be horrible."

In December 1980, in response to a question on what was being done to resolve the program problems related to child custody matters, a Marshals Service official told the Senate Permanent Subcommittee on Investigations, Committee on Governmental Affairs, that the Department had changed its policies governing these matters so that "* * * we don't impose ourselves as being a domestic court." The Department began to offer relocated witnesses involved in child custody problems the opportunity to litigate these disputes before appropriate courts. The Department offers to provide and pay for a witness' counsel and to provide transportation and protection so that they can return in a secure manner and litigate the issues in State court proceedings.

The Department's policy was a step in the right direction and may have helped to reduce the extent of these problems. However, it did not resolve all such problems because it relied heavily on witness cooperation and did not address what would happen if a witness refused to cooperate by rejecting the Department's offer. When witnesses rejected the Department's offer, third parties face the same problem they did before the revised policy was established. They possessed a court judgment, but the Department would not disclose the necessary information to permit them to seek enforcement of the judgment.

At the time of our fieldwork the Marshals Service did not know how many parent/child relationship disputes had occurred since program inception. Through discussions with agency officials and private attorneys and by reviewing court cases and newspaper articles, we identified 10 separate instances where the relocation of a witness caused problems of this sort. The problems identified primarily related to non-relocated custodial parents attempting to regain custody of their relocated children, non-relocated parents attempting to enforce court-granted visitation rights, and non-relocated parents attempting to enforce custody rights granted to them after the relocation of their children. The problems persisted because the Department did not disclose a witness' identity to assist in the resolution of a civil dispute.

One type of parent/child relationship problem arises when children are relocated with a parent who does not have legal custody. In 3 of the 10 cases, minor children were relocated with their parents despite the fact that the parent did not have clear legal custody at the time of the relocation. For example, the Department relocated two children with a noncustodial mother who was admitted to the program in September 1979 with a witness who testified against members of a motorcycle gang. Neither the attorney who sponsored the mother and children into the program nor the Marshals Service adequately verified the custody status of the children before they were accepted into the program. Additionally, no notice was given to the non-relocated father before the children were relocated. It took the father 7 months after relocation to discover his children had entered the program. At that time, the Department advised the father's attorney that the mother would be produced for a State court hearing on the custody matter. In May 1980, a State court hearing was scheduled for late June. However, the mother never appeared at the hearing. The father subsequently brought suit in Federal court to have the children returned. In May 1981 a Federal judge ordered the Marshals Service to return the children to the father, and he was reunited with them shortly thereafter.

This example illustrates a number of shortcomings in the program. First, by failing to properly verify the custody status of the children, a needless third party problem was created and the father was unable to see his children for over 1-1/2 years. Second, the Department's offer to return the mother to the danger area and pay her expenses to attempt to gain legal custody did not resolve the father's problem because she never appeared at the hearing. The offer did not improve the father's situation because he still did not know where or against whom to seek enforcement of his custodial rights. Finally, by not advising the father until April 1980 that his children were in the program (even though it knew of his custody rights in October 1979), the Department hampered his ability to seek the return of his children.

In another custody-related incident similar problems occurred. In January 1980, the Department relocated a father with his son. At the time the father entered the program, the child's mother had legal custody but had allowed the child to live with the father because of discipline problems with the child. The Department did not adequately verify the custody status or notify the mother about the admission of her son into the program with his father. While the child was still with the father, the Marshals Service arranged a visit between the mother and her son. According to the mother's attorney, the visit took place in a motel room at a neutral location with deputy marshals present. The mother found this arrangement totally unacceptable and would not accept further visitation offers. The mother also initiated

an action in State court to enforce her custody rights so that she could ascertain whether the relocation was in the best interest of the child. However, in January 1982, before the State court rendered any ruling on the mother's petition, the child ran away from the father and returned to the mother.

Custody-related problems of this sort can be avoided by verifying the existing legal custody status of all minor children before they are relocated. Appropriate court documents should be examined before relocation takes place. Program procedures should specifically delineate how to verify a witness' child custody claims. Inadequate efforts were made in the three cases to verify the custody status of the relocated children.

In commenting on our draft report, the Department stated that it has been a longstanding verbal policy of the Marshals Service to verify all child custody orders and that this was formalized in a September 1981 memorandum. The verification policy was reemphasized again in a memorandum 8 months later. However, we were not provided a copy until December 1982. Because the Department's formal written policy implemented several of the recommendations contained in our draft report, we modified our recommendations. We believe the Department's actions could help to mitigate situations similar to the three described above.

In other situations non-relocated parents have not been able to exercise their court-established visitation rights. This occurred in 7 of the 10 cases we identified. These non-relocated parents did not see their children for periods ranging from 2 months to 9 years (median of 4 years 2 months). For example, one non-relocated parent had visitation privileges to his three children granted to him in 1974 and exercised those rights until February 1978 when his ex-wife entered the program with a witness. Since then he has had no contact with his children. The Marshals Service has conveyed to his ex-wife the request of the father to visit the children, but she will not agree to allow him to visit them. The Marshals Service states that his ex-wife is in the program on a voluntary basis and she is not in Federal custody. Thus, it cannot require her to allow the father to visit the children. The Marshals Service states that all it can do is to convey to the ex-wife the father's request for visitation and if she agrees, it may facilitate the visitation by selecting a neutral site and providing transportation of the children to the neutral site.

We believe the Marshals Service should have done more than just convey the father's visitation request to the mother. It should have advised her that if she did not comply with his

visitation rights, her new identity and location would be subject to disclosure to enable the father to seek the legal enforcement of those rights. By doing this, the Department could have created a more equitable balance between the need to protect a witness and the need to enhance the ability of third parties to enforce judgments.

Another type of custody problem that arises involves situations where non-relocated parents win legal custody of their children after the children have entered the program. Again, problems resulted because the Department would not disclose the relocated parents' or children's location or identity to facilitate enforcement of the non-relocated parents' court-ordered custody rights. This situation occurred in 2 of the 10 cases. In both instances, the non-relocated parent was awarded complete custody over the child(ren). However, only one of the two relocated parents abided by the court order. In the other case, the State court custody order was not enforced because the identities or locations of the relocated parent or the children were not divulged by the Department to facilitate enforcement. As a result, the father did not see his children until his ex-wife decided she had done an injustice to the children and their father and put the children in contact with him. This occurred about 8 years after the children were relocated.

Custody and visitation problems caused by the relocation of witnesses have been longstanding and have proven to be difficult to resolve. The Department tried to address these matters (1) by offering to transport relocated children to neutral sites to allow their non-relocated parents to visit with them and (2) by offering to aid relocated parents' efforts to litigate problems before appropriate courts. However, these attempts have not fully resolved problems because at times relocated parents have not cooperated or accepted the Department's offers. Thus, non-relocated parents continued to be faced with the problem of not being able to exercise their legitimate parental rights.

Creditors have not been fairly protected

The basic program policy of not disclosing a witness' new identity and location to resolve a civil dispute also adversely affected creditors of witnesses admitted to the program. It interfered with creditors' ability to recover legitimate debts owed to them by witnesses, resulted in litigative expenses for creditors, and in effect, shielded witnesses from paying their lawful debts.

The problem of witnesses leaving behind unpaid debts is also longstanding. This was recognized by the Marshals Service in congressional hearings in 1978 and 1980. The problem remained over

the years because program procedures only required the Marshals Service to act as a secure conduit for transferring information between the creditors and witnesses and did not require the Marshals Service to actively assist creditors. This resulted in the Marshals Service being a barrier to the resolution of debt-related problems.

The Memorandum of Understanding advises witnesses that they are responsible for settling all of their debts. It states that the Marshals Service will not shield them from creditors and will serve them with legal process should they be sued by creditors. It warns witnesses that creditors may resort to private investigators whose activities will seriously jeopardize their security. It had been the Department's policy, however, that the Marshals Service would not disclose a witness' new identity or location to resolve a civil debt.

Although the Marshals Service serves (in a secure manner) legal process on a witness if litigation is initiated, this often does not resolve debt-related problems. Witnesses can and do ignore the litigative process served on them and subsequently this often results in courts rendering default judgments 6/ to the creditors. Further, witnesses often ignore the default judgments served on them. When this happens it is difficult, if not impossible, to enforce these judgments without information that identifies and locates witnesses.

The Department's procedures acted to shield and encourage witnesses not to satisfy their lawful debts and have caused third party creditors unnecessary hardships in attempting to collect money owed to them. In fact Marshals Service officials told us they knew of witnesses who had deliberately run up revolving credit type debts in their old identities before they were relocated because they believed they would not be responsible for the debts after relocation.

The hardships encountered by creditors in attempting to recover money from relocated witnesses were acknowledged in a recent Federal court case. In this situation the Government was sued by a company claiming that a witness had failed to repay a loan and that the Government's concealment of the witness was depriving the creditor of its right to enforce repayment of the loan. The creditor sued to recover the amount of the loan under the theory that the money was taken by the Government without payment of just

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6/A default judgment is a judgment rendered on behalf of the plaintiff because the defendant failed to appear in court or plead his/her case at the appointed time.

compensation. Although ruling that the creditor had not made a claim upon which relief could be granted, the court stated

> "We recognize it is not unlikely that the consequential effect of government actions in carrying out the program may be to delay, or make inconvenient or difficult, plaintiff's enforcement of [the witness'] financial obligations while he continues in the program." 7/

It is difficult to estimate the amount of financial losses to third parties resulting from the actions of relocated witnesses. At the time of our fieldwork the Marshals Service did not systematically gather information to identify the extent of this problem. In December 1980, however, the Marshals Service testified that it answers 35 letters a month from creditors or persons alleging they have been defrauded by witnesses. In an attempt to gauge the extent of this problem, the Marshals Service provided us, at our request, with the latest available information on relocated witnesses. For a 6-month period in calendar year 1980, the Marshals Service provided us with credit-related information for 36 witnesses.

The 36 witnesses' cases involved instances where the Marshals Service had received correspondence indicating the existence of a complaint and/or litigation against a witness. Four of the 36 had liabilities for which a specific amount could not be calculated. The total obligations owed or allegedly owed by the remaining 32 witnesses was over $7.3 million. 8/ These debts could be categorized as follows:

--20 witnesses owed debts which were affirmed by court orders, or owed criminal fines or had tax liabilities ($807,000),

--15 witnesses owed debts which were alleged in ongoing litigation ($6,441,000), and

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7/Melo-Tone Vending Inc. v. United States 666 F.2d 687 (1st Cir. 1981).

8/This information should not be construed as being statistically projectable to all witnesses or to a specific time period because the sample was not randomly selected.

--10 witnesses owed debts which were alleged but not litigated ($90,000). 9/

The types of third parties financially harmed by relocated witnesses were individuals, large companies, and the Government itself. For example, there were doctors seeking to recover money for services rendered, non-relocated parents seeking to collect child support, a woman seeking to recover a personal loan, a stock brokerage firm seeking to recover money from a former employee, and Government agencies seeking to recover unpaid criminal fines (Department of Justice) and taxes (Internal Revenue Service). Creditor-related problems can arise from events occurring either before or after relocation. In both instances the effects were the same--third party creditors had their ability to recover legitimate debts disrupted by the program.

One example of this problem involved a witness who defaulted on an automobile lease agreement and was indebted to the leasing company when he entered the Witness Security Program. In July 1980, the company initiated legal action against the witness to collect the money, and the Marshals Service served the initial complaint on the witness. In January 1981, the court rendered a default judgment against the witness for over $8,400. The Marshals Service served the judgment on the witness, but the witness did not act to resolve the debt. As of August 1982, no money had been collected by the company to satisfy the debt. The judgment has been unenforceable because the company does not know where the witness is located.

Another example involved a witness and his wife who were relocated to a midwestern State. In February 1979, the Marshals Service contacted a local bank and explained to the bank's representative that the individuals were in the Witness Security Program, recently relocated in the area, and needed a car to provide them with transportation to their places of employment. Although the bank could not obtain specific background information on the couple, the Marshals Service representative related that they had no record of bad credit. Subsequently, the bank loaned the couple $6,600 to purchase automobiles.

After several payments, the couple defaulted on the loans and left the relocation area with the cars. At this point, the bank instituted legal proceedings against the couple to recover its money. The whereabouts of the couple was known to the Marshals Service because it served process on the couple several times

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9/The total number of debts owed does not equal 32 because some witnesses had debts in more than one category.

during the progress of the litigation. The bank eventually won a judgment against the couple for about $6,000. Notice of this judgment was served on the couple, however, they failed to respond. Although the Marshals Service knew the location of the couple after the problem arose and followed its policy of serving process on them, the bank had not recovered any of the money. It was unable to enforce its judgment on the couple because it did not know which court to petition for enforcement action and the Department would not disclose the location.

Government agencies are also adversely affected by the program's procedures. For example, 6 of the 36 witnesses for whom the Department gave us information owed either Federal and/or State fines (totaling over $34,000). As with the other cases, we could find no indication that the Department disclosed a witness' location to permit enforcement.

NEW DEPARTMENT PROCEDURES AND LEGISLATIVE INITIATIVES: EFFORTS TO BETTER RESOLVE THIRD PARTY PROBLEMS

In April 1982, the Department issued an internal memorandum that modified its policy for handling third party problems and during the 97th Congress several bills were introduced to provide a more equitable solution for third parties attempting to enforce judgments against relocated witnesses. In general, all of these initiatives provide for the disclosure of a witness' identity and location in circumstances where the witness has been unreasonable in his/her efforts to comply with a court judgment and where the Attorney General believes no danger to the witness would result from the disclosure.

All of these initiatives call for Department officials to make the final decision on whether disclosure will take place. However, because the Department operates the Witness Security Program, these approaches raise questions about the Department's ability to make objective disclosure decisions. We believe these basic approaches to resolve third party civil problems can be enhanced by

--clarifying in law the circumstances under which a witness' new identity and location will be disclosed and

--providing third parties the right to seek judicial review of nondisclosure decisions.

New procedures: a major change but further refinements needed

In April 1982, the Department issued an internal memorandum to facilitate the collection of legitimate debts by third parties. On a case-by-case basis, the Marshals Service now considers whether it should disclose a witness' identity and location to enable creditors to seek enforcement of court judgments. Essentially, when the Marshals Service learns a witness has unpaid legitimate debts, it will encourage creditors to serve legal obligations through the Service. If the witness does not pay the debt or arrange for a payment schedule (which the Marshals Service would facilitate for security purposes), the Marshals Service will (1) investigate the creditor to determine whether the debt was legitimate and (2) advise Enforcement Operations about the witness' debt and, with its concurrence, give the witness written notice that he/she has 30 days to arrange to satisfy the debt before their location will be revealed to the creditor. A Marshals Service official told us that before making a disclosure, a number of other factors will also be considered. These include whether (1) the witness has been unreasonable in his/her efforts to satisfy the judgment and (2) the disclosure would compromise any ongoing criminal investigation or trial.

Neither the authorizing statute nor the legislative history gave the Attorney General any guidance on handling third party problems. As such these problems have created a difficult dilemma for the Department. On one hand, the Department has made a commitment to protect the lives of witnesses in the program. The protection it provides them is enhanced by keeping their new identities and locations a closely guarded secret. On the other hand, as the Nation's chief law enforcement agency, the Department has a basic obligation to uphold the law and assist in its enforcement. When a third party seeks to enforce a court order against a relocated witness, the Department must make a difficult choice between these principles.

We believe the Department's new procedure for handling third party debt-related problems is a significant change. The Department has recognized that third parties can be treated more fairly and, under appropriate circumstances, disclosures of witness information can be made without compromising the safety of the witness or the integrity of the program. We believe, however, that several actions can be taken to enhance the resolution of third party civil problems.

First, because the internal memorandum is general in nature and subject to administrative change and because the authorizing statute contains no guidance on handling these matters, we believe specific legislative criteria needs to be established that

will guide the program as it relates to third parties. Second, under the new procedure, the final decision on disclosure rests within the Department--the agency which operates the program. Instead, we believe that difficult decisions such as the balancing of two parties' respective equity rights, would be better achieved by the establishment of a judicial review mechanism that allows third parties to appeal nondisclosure decisions. Third, the Departments' memorandum is silent on how the Department will handle situations involving parent/child relationship problems. We believe that any policy established in this area should also apply to these types of civil problems.

It is understandable why the Department would not want to have a blanket disclosure policy. For example, it is possible that the third party may represent a threat to the safety of the witness or that disclosure will not benefit the third party because the witness has no ability or resources to satisfy a judgment. Thus, we believe the initial decision point on disclosure should rest with the Department. However, we believe third party rights can be better recognized and protected if the law provided clear guidance to the Department on when it should disclose witness information to third parties seeking to enforce judgments and if the law established a clear right for third parties to contest, in a Federal court, whether the Department had met the criteria for nondisclosure established in law.

Legislation has been introduced addressing the problem

During the 97th Congress, several bills were introduced that contained provisions addressing third party civil problems. The basic intent of two of these bills (S. 2420 and H.R. 6508), which were nearly identical 10/ was to enhance the Government's ability to protect victims and witnesses of crime. However, both bills contained major sections that would have amended the legislation governing the Witness Security Program. In August 1982, H.R. 7039 was introduced. This bill would have made changes involving all of the Marshals Service's operational areas, including amending the legislation governing the Witness Security Program. We believe the bills clearly show congressional interest in correcting the civil problems third parties encounter as a result of the program, and we have several observations about them.

10/In October 1982, S. 2420 was enacted into law; however, the provisions of the bill relating to the Witness Security Program were deleted before passage by the Congress.

In general, each bill required the Attorney General to take affirmative actions to urge the relocated person to comply with the judgment and to determine whether the relocated person had made reasonable efforts to comply with the judgment. If the Attorney General determined that the relocated person did not make reasonable efforts to comply with the judgment, he could, at his discretion, after weighing the danger to the person relocated, disclose the identity and location of that person to the plaintiff attempting to enforce the judgment.

House bill 7039, however, contained two differences from the other two bills. First, H.R. 7039 would have allowed the procedures listed above to be implemented when a witness was named in a civil action arising both before and after a witness was relocated; whereas S. 2420 and H.R. 6508 would have limited these procedures to those civil actions arising prior to relocation. We believe the expanded coverage proposed in H.R. 7039 was more desirable because it would have been a broader solution to the third party problem and would have addressed situations such as those illustrated on page 26. Second, the general procedures of H.R. 7039 would have applied to all civil actions while the other two bills' procedures would have applied only to civil actions "for damages resulting from bodily injury, property damage, or injury to business." Again, we believe the expanded coverage proposed in H.R. 7039 was preferable because it would have addressed the child custody/visitation problem described in this chapter whereas the other two bills would not. It should also be noted that, in commenting on our draft report, the Department stated it fully supported the provisions proposed in H.R. 7039 relative to witnesses' debts and other legal responsibilities of program participants.

We believe these bills clearly demonstrate congressional interest in solving a difficult problem. However, similar to the Department's new procedure, all of the bills would have vested the ultimate decision on whether to disclose with the Attorney General. As mentioned earlier, these disclosure decisions place the Attorney General in the difficult position of balancing the relative importance of the judgment to be enforced against the need to protect witnesses enrolled in the very program the Department is charged with operating. Thus, while all of these bills indicated a congressional interest in the program, we believe any legislative initiative in this area should contain a provision for a judicial review of the Attorney General's nondisclosure decisions if a third party so desires. In addition, if disclosure is granted, then sanctions against third parties for improper use of the information should be established.

CONCLUSIONS

The Witness Security Program is a difficult program to administer fairly because of the effects it can have on the lives of various people. Furthermore, its use is risky because of the trauma it causes witnesses admitted to the program, their criminal backgrounds, the limited education and job skills witnesses often possess, and the inherent conflict in the program goals of keeping witnesses' new identities and locations secret while at the same time helping them to become self-sufficient and protecting the rights of the public.

A longstanding problem that has been encountered in the conduct of the program is the frequency with which third parties have encountered difficulties when attempting to enforce judgments against relocated witnesses who have ignored their civil obligations. Although the Department has recognized the need to safeguard the public from the unscrupulous actions of some witnesses, until April 1982, it had a policy of not disclosing a witness' new identity and location to a third party seeking to enforce a court judgment. As a result, third parties (non-relocated parents and creditors) were adversely affected and the Department put itself--the Nation's chief law enforcement agency-- in the ironic position of being a contributing factor in witnesses being able to avoid their lawful obligations.

The Department issued an internal memorandum in April 1982 and during the 97th Congress several bills that addressed the resolution of these civil problems were introduced but not enacted. Both sets of actions were significant because for the first time each specifically allowed the Department, at its discretion, to disclose pertinent information on witnesses if the Attorney General believes (1) a witness has not made reasonable efforts to comply with a court judgment and (2) the disclosure will not result in harm to the witness. However, because under all of these approaches the final decision on disclosure rests with the Department, a question could arise about the objectivity of the Department's decision.

Third party problems create a dilemma for the Department. We believe that a better balance between the need to protect witnesses and the need to protect the public from unscrupulous actions by witnesses can be reached through a combination of legislative and administrative actions. To give the Attorney General guidance in this difficult area, the Congress should clearly define the circumstances under which disclosure will and will not occur. The Congress should also provide third parties the right to seek judicial review of whether the facts support the propriety of a nondisclosure decision. We believe such changes would

promote the more objective application of disclosure criteria while at the same time protect the security of the witness where the circumstances dictate. Also, the Department should take administrative actions to reach an upfront and secure resolution of these third party problems before a decision on disclosing a witness' identity or location becomes necessary.

RECOMMENDATIONS TO THE CONGRESS

To better recognize the rights of third parties seeking to enforce court judgments directed against relocated witnesses, while at the same time protecting the safety of witnesses, we recommend that the Congress enact legislation that requires the Attorney General to:

--Make reasonable efforts to serve legal process, especially court judgments, on a relocated witness and, in the case of a court judgment, to advise third parties in a timely manner about the witness' intentions to comply with or otherwise respond to these judgments.

--Disclose, in a secure manner, the best known information on the current identity and location of a witness only after a witness is given a chance to comply with or appeal a judgment and only in circumstances when the Attorney General is unable to determine on the basis of available evidence that (1) the disclosure could likely result in physical harm to the witness or (2) the witness does not have the ability (financial or otherwise) to resolve the judgment.

We further believe that the legislation should:

--Provide, upon petition of the affected third party, for Federal judicial review as to whether the disclosure decision made by the Attorney General was arbitrary and capricious (without any reasonable factual basis).

--Provide that any information disclosed to a third party by the Attorney General can be used only in connection with the process of seeking the legal enforcement of a court judgment and establish criminal penalties for the improper use of this information. (See app. III.)

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General modify program policies and procedures to reduce the chances of third parties being harmed by the relocation of witnesses while at the same time ensuring the safety of witnesses by:

--Advising witnesses when they enter the program that they are expected to comply with court judgments directed against them or to take the necessary legal actions to resolve such disputes, otherwise their new identity and location will be disclosed to third parties who possess court judgments unless the Attorney General determines on the basis of available evidence that disclosure could be harmful to the witness' physical safety or that the witness does not have the ability (financial or otherwise) to resolve the judgment.

--Notifying non-relocated parents of the pending admission of a minor child to the program and of the procedures that the Department will follow to ensure that his/her legally established parental rights may be exercised after the child enters the program.

--Offering all witnesses the opportunity and necessary assistance (transportation, protection, etc.) to safely go into court and litigate civil matters.

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice commented on this report by letter dated December 10, 1982. (See app. IV.) The Department stated that on balance the report is a thorough and well researched study of a very sensitive operational and legal area. The Department stated that it agreed with our recommendations to the Attorney General. It also agreed with our recommendations to the Congress except for the one that would provide third parties the right to seek judicial review of any nondisclosure decision by the Attorney General. The Department also proposed the use of court-appointed masters to resolve third party problems. The Department's reservation with the judicial review recommendation and our rebuttal, along with the Department's proposal to use court-appointed masters and our discussion of this proposal are detailed below.

Judicial review of
nondisclosure decisions

The only area of disagreement between the Department and us is whether the Congress should enact legislation giving third parties possessing court judgments against relocated witnesses the right to appeal nondisclosure decisions. The Department objects to our recommendation for judicial review because it believes its new administrative procedures and those under consideration should be given a chance to work. It stated that the report has not substantiated that fair decisions on disclosure cannot be made simply because it operates the program. Rather, because the Department has access to all relevant information, it stated that it should make the final decision on disclosure. Thus, the Department believes our recommendation could involve it in unnecessary and, possibly, lengthy litigation. In addition, the Department stated that existing statutes already provide adequate avenues for judicial review.

First, we do not agree with the Department's contention that providing qualifying third parties the opportunity to petition for judicial review of nondisclosure decisions is unnecessary. Neither the authorizing legislation nor its legislative history provide any guidance to the Attorney General on the resolution of these matters. As a result, the Attorney General has broad discretion in establishing the program's operating policies. Because no specific duties have been placed upon the Attorney General in this area, third parties have little recourse in dealing with a refusal by the Attorney General to disclose information needed to enforce a judgment. Thus, we believe the Congress should rectify this situation by providing for judicial review and by clearly defining the circumstances under which disclosure will and will not occur.

Additionally, we believe our recommendation for judicial review will establish a system of "checks and balances" which considers the interests of all parties from an independent viewpoint. As the report clearly shows, the secret relocation of witnesses can interfere with a third party's ability to enforce a judgment against a witness. Questions regarding the balancing of one party's rights versus another's are generally reserved for the judicial branch of the Government. Thus, we believe the Congress should establish a mechanism--judicial review--that would more appropriately handle these difficult tradeoffs rather than leaving their resolution subject to an executive agency's internal procedure.

Second, we do not concur with the Department's concern that providing for judicial review could possibly result in lengthy litigation. The relative lengthy or brevity of litigation would be a function of each individual case. If our point about the necessity to better balance the interests of both third parties and the Department is accepted, then it is clear that the overriding concern is not the possible length or brevity of litigation, but rather the importance of resolving these conflicts in a fair manner. But even beyond this basic point, it should be recognized that our recommendations limit both the number of parties who qualify for judicial review as well as the issue(s) subject to review. Specifically, only third parties who (1) possess court judgments against relocated witnesses, (2) have followed, unsuccessfully, Department procedures for resolving these disputes, and (3) have petitioned the Attorney General for disclosure and been denied would qualify for judicial review. Further, the judicial review would be limited in scope to matters related to the Department's nondisclosure decision, and whether such decision was arbitrary and capricious.

In this regard, we believe our recommendation concerning judicial review complements the Department's April 1982 memorandum on resolving third party problems. Given the Department's position, which provides for disclosure as a solution, there should be a reduction in the number of instances when it makes nondisclosure decisions. (As pointed out on page 19, prior to April 1982, the Department had a blanket policy of not disclosing information to resolve a civil dispute.) Also, we believe that if the Department implements our recommendations to the Attorney General, it can reduce the possibility of third party problems arising. Thus, we believe our proposal for judicial review establishes a rational system to resolve these difficult problems.

Moreover, the Department stated that existing statutes provide adequate avenues for judicial review of the Department's decisions concerning these matters. It stated that persons aggrieved by its refusal to provide information could bring a private action under existing statutes--the Civil Rights Act (42 U.S.C. 1983) or the Freedom of Information Act (5 U.S.C. 552).

Neither the Civil Rights Act nor the Freedom of Information Act provide adequate remedies for persons aggrieved by the Department's refusal to disclose information needed by third parties to enforce judgments against relocated witnesses. The basic purpose of the Civil Rights Act of 1871 is to be an enforcement mechanism for the provision of the Fourteenth Amendment of the Constitution prohibiting States from infringing on the constitutional rights of its citizens. The act generally

provides that any person who, under the color of State law, deprives another of rights secured by the Constitution, is liable to the injured party. The courts consistently have held that this act provides no cause of action against Federal officers acting under color of Federal law.[11]/ In particular, it has been held that officials of the Department of Justice acting within their official capacity under Federal law, could not be liable under the act.[12]/ A refusal by Justice to disclose information concerning a protected witness presumably would be based on the broad authority contained in Title V of the Organized Crime Control Act of 1970. Thus, it would appear that any such refusal would be viewed as an action taken by a Federal officer under the color of Federal, not State law, and, therefore, would not be actionable under the statute. Further, it is uncertain whether the Federal courts would have jurisdiction over these matters even if the action was performed under the color of State law. This uncertainty exists because the refusal to disclose information to a third party does not appear to violate the type of constitutional protections contained in the Fourteenth Amendment and the Civil Rights Act.

Similarly, we do not believe satisfactory redress would exist for a third party under the Freedom of Information Act. The types of information a third party would need to help enforce his/her judgment (e.g. a witness' present location) has been held to be exempt from Freedom of Information Act disclosures. For example, in Librach v. Federal Bureau of Investigation 587 F.2d 372 (8th Circuit, 1978), it was held that

> "The records [being requested] pertain to the relocation of a witness under the Department of Justice's Witness Security Program. The [district] court agreed with the government's contention that to release these materials would jeopardize the effectiveness of the Witness Security Program and would invade the personal privacy of the witness. We [the circuit court] agree ***"

11/Stonecipher v. Bray, 653 F.2d 398 (9th Cir. 1981); Campbell v. Amax Coal Co., 610 F.2d 701 (10th Cir. 1979); Soldevila v. Secretary of Agriculture of U.S., 512 F.2d 427 (1st Cir. 1975); Williams v. Rodgers 449 F.2d 513 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972).

12/Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965).

Additionally, in another decision 13/ directly relevant to a third party problem (i.e. child custody), a similar interpretation was made. In this instance, a non-relocated mother was attempting to obtain information concerning her relocated minor son under the Freedom of Information Act. The court held:

> "We agree that release of some of the information sought would likely interfere with the operation of the Witness Protection Program and thereby be protected from release by exemption 7 of the [Freedom of Information Act]. Other information, however, such as that relating to [the son's] current health and educational arrangements, would not appear to be exempt from disclosure except to the extent that the documents containing the information might indicate his present location."

Questions exist about the proposed master concept

The Department stated that it is proposing the use of a court-appointed master or referee who can enforce the judgment in the area where the witness has been relocated. The Department stated that its research indicates that the court in which the judgment was obtained can appoint a master or referee who can, with appropriate instructions, provide for the security of the witness while performing those acts necessary to enforce the creditor's judgment. This approach would require the Attorney General to divulge the witness' location to the master and not to the third party.

A master or referee acts essentially as an assistant to a judge. They can generally be appointed only to certain types of cases. Both Federal and State courts have limitations on the appointment of masters. The scope of a master's duties or responsibilities are generally limited to those which have been delegated by a judge. The master or referee can be authorized to hear testimony, secure evidence, and give a report to the court. The final report, which is subject to a judge's approval, is a matter of public record. During the process, parties are able to exercise their due process rights by filing objections, exceptions, and motions to attempt to modify all or part of the report.

13/Ruffalo v. Civiletti: Order granting in part and denying in part Federal defendants' motion to dismiss and denying plaintiffs' motion for partial summary judgment. No. 80-0675-CV-W-6 (Western District, Missouri, April 30, 1982).

We believe that any secure mechanism which enables third parties to enforce their judgments against witnesses is worth consideration. However, we believe there are areas of concern (some of which are highlighted in the Department's own research) which raise questions about the potential usefulness of its proposal. These questions include:

--Would the appointment of a master be appropriate in these types of cases given the limitations on their use contained in both Federal and State laws?

--Under what authority would a master or referee, appointed by the court in which the judgment was obtained, be able to enforce that judgment against a witness located in another jurisdiction?

--Will the master or referee concept be as costly and burdensome to the parties as it has proven to be in the past?

--Can the master concept be effectively and legally operated when one party (third party) cannot have complete access to the information pertaining to the suit (thus limiting their ability to object or take exception to the master's report)?

We want to emphasize that we are not against the master or referee concept. We simply wish to highlight some potential problems that we perceive may limit the concept's effectiveness in resolving third party problems. If these perceived problems can be overcome, then we believe the master or referee concept is worthy of consideration as a complement to our judicial review recommendation. The effective use of the master or referee concept could further limit the need for third parties to apply for Federal judicial review to only the disputes which cannot be resolved by the master.

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CHAPTER 4

IMPROVEMENTS IN MANAGEMENT INFORMATION AND PROGRAM EVALUATION ARE NEEDED

Managers must have adequate information in order to plan and control the activities of an organization. Furthermore, procedures must be in place for managers to determine if the goals and objectives of an organization are being met. However, after the admission of over 4,000 witnesses, 12 years of operation, considerable controversy, and the expenditure of over $100 million, these fundamental management elements are not fully in place for the Witness Security Program. Without adequate information and procedures to facilitate evaluation, neither the Department nor the Congress can fully assess program effectiveness, identify problems, or develop strategies for improvement.

BETTER MANAGEMENT INFORMATION NEEDED

The Department's Witness Security Review Committee made specific recommendations in 1978 to improve the management information system for the program. The review committee found that program files were poorly organized and incomplete. The committee, in its report, stated that the Marshals Service should monitor the criminal arrests and convictions of witnesses involved with or previously relocated by the program. Finally, it noted that program records did not allow anyone to determine how successful the program has been in fighting organized criminal activity and that it was impossible to determine what kinds of witnesses were most likely to be productive.

Actions have been taken to correct some of these deficiencies. For instance, a Department internal report issued in April 1981, also called for improvements in collecting information to assess how successful the program has been in gaining convictions. As a result, in May 1982, a revised program admission application was adopted. The new application attempts to capture more qualitative details about (1) the significance of the prosecution, (2) the scope of the illegal activity for which the defendants are being investigated, and (3) each defendant's role in the illegal activity. If properly utilized, we believe this application will be a good starting point in attempting to assess the overall prosecutive value of the program.

Additionally, actions have been taken by the Office of Enforcement Operations and the Marshals Service to improve the maintenance and organization of files. For example, a common identification number is now assigned by Enforcement Operations and the Marshals Service to all witnesses who enter the program.

In addition, the Marshals Service's program files are organized by subject matter (documentation, movement of household goods, etc.) to provide easier access to various types of detailed information about the support provided to witnesses.

Other deficiencies in collecting and assessing program information, however, have not been addressed. The Marshals Service has not properly tracked information related to the overall costs and impacts of relocating witnesses (e.g. criminal activity and unresolved debts by witnesses). At the time of our fieldwork, the Marshals Service had established a procedure to track the arrests of witnesses relocated by the program; however, this arrest log was not prepared or maintained in a consistent fashion. Its condition prevented any meaningful determination of the number of witnesses arrested and/or convicted as suggested by the review committee. Also at the time of our fieldwork no attempts were being made to gauge the extent of losses suffered by creditors or problems of non-relocated parents caused by witnesses who ignore court orders of a civil nature.

As a result, many questions about the "true" cost of the program remain unanswered. For example:

--Is there a need to vary the way security is provided to witnesses based on the potential risk their placement in an unsuspecting community may pose?

--What has been the extent of financial losses incurred by various third parties because of their inability to enforce civil judgments against witnesses?

The Department needs to routinely gather information of this nature to properly assess the benefits and costs of the program as well as to identify and correct problems caused by program operations. As discussed on page 15, most witnesses have criminal backgrounds. Some have committed crimes (including murder) after relocation, and some have caused substantial harm to various third parties. The net benefit of the program cannot be properly monitored without this information.

Another basic problem pertains to obtaining information about the backgrounds of witnesses and their current status in the program. The Marshals Service has attempted to centralize information on individual witnesses in an automated records system. This system was designed to provide quick access to pertinent information as well as to generate overall data on program operations. After over 2 years of operation, this system remains largely unusable because it is incomplete and sporadically updated.

Several times during our review we tried to obtain general information from the Marshals Service's automated records system to examine various aspects of the program. Each time substantial problems existed with the information we received. We initially requested detailed background information about persons in the program (e.g. education, job skills, employment, and criminal history) and documentation services given to witnesses. We chose a random sample of 300 witnesses. Of these, 150 witnesses were admitted to the program during 1976 and 1977, and 150 witnesses were admitted to the program during 1979. As shown in the following table, however, the information provided was substantially incomplete.

	Sample period			
	1976 - 1977		1979	
	Number	Percent	Number	Percent
Witnesses in sample	150	-	150	-
Number of witnesses for whom information was received:				
General background information	16	10.7	12	8.0
Documentation information	1	.7	21	14.0
Both general background and documentation information	0	0.0	5	3.3

In April 1982, we requested the general background information for the same 300 witnesses. This time we found that substantially more data was available, but it was still largely incomplete. Specifically, we received general background information for only 17.3 percent of the 150 witnesses in the 1976-1977 sample and for 45.3 percent of the 150 witnesses in the 1979 sample.

Furthermore, even when information was provided, it was often of limited value. For instance, the listing provided by the Marshals Service for the witnesses admitted to the program from April 1979 through January 1982 (approximately 40 percent complete) showed that 88 percent of these witnesses were listed as "unemployed" and the criminal history for 71 percent of these witnesses was listed as "unknown."

Because this data appeared to conflict with previous congressional testimony regarding the general unemployment rate and criminal backgrounds of witnesses in the program, we pursued the matter further. Subsequent discussions with Marshals Service personnel revealed that when most witnesses are admitted to the program, their employment status is listed in the computer as "unemployed" and their criminal background is listed as "unknown." According to the Marshals Service, the data in the listing given to us had not been thoroughly updated. Thus, for the witnesses

most recently admitted to the program, we could not accurately assess their employment status or criminal background.

PROCEDURES ARE NEEDED TO FACILITATE INDEPENDENT EVALUATION

Because of the program's highly sensitive nature, the Marshals Service and the Office of Enforcement Operations established audit arrangements that enabled us to examine program operations and documents without disclosing the new identities and locations of witnesses. Essentially, at our request program personnel reviewed selected case files and provided us with summarized information on various operational aspects of the program and copies of various types of documents. However, before any documents were provided, the names and locations of witnesses were deleted to avoid compromising a witness' security.

While these audit arrangements protected the new identity of witnesses, they were cumbersome and time consuming to our efforts. The staff of the Senate's Permanent Subcommittee on Investigations had similar complaints during December 1980 hearings on the program. Their objections primarily concerned the Marshals Service's assistance in the use and preparation of questionnaires sent to witnesses. Finally, we believe the audit arrangements significantly and needlessly detracted from the available time that program personnel had to devote to their regular duties. This is particularly critical considering the resource problems continually cited by the Marshals Service.

We recognize that the Witness Security Program is extremely sensitive and that much of its success relies on the security given program information. We further recognize it is vital for the Department to limit access to some program information to maintain security. Nevertheless, we believe independent program reviews can be made without diminishing the overall level of security. Secure conditions under which independent reviews will be conducted can be established without seriously disrupting program operations. These could include establishing required security clearances for persons granted access to files, mandating controls over records and files, and restricting the number of people granted access. Similar types of conditions already exist for personnel who work in the program. For example, program personnel have access to information and can take program knowledge with them when they get reassigned or leave Government service.

Program decisions by the Department and the Congress should be made with a clear understanding of the benefits (effectiveness in gaining criminal convictions) and the costs (Federal expenditures and impacts on third parties) attributable to the Witness

Security Program. After 12 years of operation, a system to facilitate an independent evaluation of the program needs to be established. In view of the controversy generated by the program, the complexity of its operation, and its overall cost, we believe it is time for the Department to establish such a system.

CONCLUSIONS

Managers must have adequate information in order to control the activities of an organization, and procedures must be in place for managers to determine if the goals and objectives of an organization are being met. However, after the admission of over 4,000 witnesses and the expenditure of over $100 million, these fundamental management elements are not fully in place for the Witness Security Program. Without adequate information and procedures to facilitate evaluation, neither the Department nor the Congress can fully assess program effectiveness, identify problems, or develop strategies for improvement.

We believe the Department should develop a more effective system to gather information on the operation of this difficult program. This system should be designed to allow independent evaluation of program operations and should include information to assess overall program results (convictions, sentences, provision of services to witnesses, etc.,), and costs to the Government, and impacts on various third parties.

RECOMMENDATION TO
THE ATTORNEY GENERAL

We recommend that the Attorney General develop an information system and procedures to allow for appropriate evaluation of the program.

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In commenting on our draft report, the Department stated it supports our recommendations to develop an information system and procedures to allow for appropriate evaluation of program operations. It cited several recent initiatives which show its support for enhanced evaluation of the program. For example, the Marshals Service has conducted on-site inspection audits of its operations. It has also designed and implemented computer software programs to facilitate operational and financial activity and said that, notwithstanding resource constraints, this effort has proven to be most beneficial to the headquarters and field staff in planning and controlling program activities. Additionally, the

Office of Enforcement Operations has begun gathering statistics for management purposes, but has been hampered by resource limitations. We encourage the Department to continue its efforts to complete this task and we believe that, if completed, both internal and external management evaluation capabilities will be enhanced.

APPENDIX I

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

September 17, 1979

Honorable Elmer B. Staats
Comptroller General
General Accounting Office
Washington, D. C. 20548

Dear Mr. Comptroller General:

Because of the jurisdiction of my subcommittee, and ongoing work it is performing on the Justice Department, I feel that certain areas and functions within the Justice Department are long overdue for evaluation by the General Accounting Office. One such area of substantial concern is the U.S. Marshal's Service. Therefore I wish GAO to undertake such a review and provide me with a report that will answer the following specific questions:

1. Is it the proper function of the U.S. Marshal's Service to serve warrants and subpoenas, or could these responsibilities be delegated elsewhere?

2. Why has this Service had such a high turnover in personnel in recent years?

3. Does the Service handle the movement of Federal prisoners with efficiency and economy?

4. How effectively does the Service utilize its personnel?

5. Is it appropriate to headquarter so many Marhsals in or near the District of Columbia while so much of their work is performed in district court areas?

6. How effectively does the Service handle the witness protection program? I feel this is a critical part of this report. If there is any resistance to GAO's entry into this area, the agency should press vigorously for access, while safeguarding anonymity and privacy where appropriate.

7. Has the U.S. Marshal's Service outlived its usefulness, and should it be merged into another organization?

APPENDIX I

Any further recommendations that you choose to make are most welcome. Agency comments are not required. The contact on my subcommittee will be Franklin Silbey. If for any reason, such as workload, the job cannot be immediately commenced, I am content to wait for a short while until adequate GAO personnel become available.

Thank you.

Sincerely,

Max Baucus
Chairman
Subcommittee on Limitations of
Contracted and Delegated Authority

SELECTED BIBLIOGRAPHY OF READINGS

RELATED TO THE WITNESS SECURITY PROGRAM

1. U.S. 95th Cong., 2nd sess., Hearings before the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, United States Senate, March 20, 23 and April 14, 1978.

2. U.S. 96th Cong., 1st sess., Hearings before the Committee on the Judiciary, United States Senate, April 6, 1979.

3. U.S. 96th Cong., 2nd sess., Hearings before the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate, December 15, 16, and 17, 1980.

4. Report on the Witness Security Program, Office of Management and Finance, Internal Audit Staff, Department of Justice, September 1976.

5. Report of the Witness Security Program Review Committee, Department of Justice, March 1978.

6. Protected Witness Payments, Witness Security Division, United States Marshals Service, Office of Management and Finance, Internal Audit Staff, Department of Justice, February 1980.

7. Graham, Fred P. The Alias Program. Boston: Little, Brown, 1977.

8. Waller, Leslie, Thomas S. Leonhard, and Pascal Calabrese. Hide in Plain Sight: The True Story of How the United States Government and Organized Crime Kept A Man From His Own Children. New York: Delacorte Press, 1976.

PROPOSED AMENDMENT TO
TITLE 18, UNITED STATES CODE

Based on our recommendations to the Congress, the proposed legislation would read:

AN ACT

To better provide for the rights of third parties seeking to enforce court judgments directed against a witness relocated or protected by the Attorney General, while at the same time protecting the safety of such witnesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that part II of title 18, United States Code, is amended by adding the following new section:

"Section _____ 1/

"(a) Notwithstanding any other provision of law, if a person relocated or protected by the Attorney General under Title V of the Organized Crime Control Act of 1970, 84 Stat. 922, is named as a defendant in a civil cause of action, all process in the civil proceeding may be served upon the Attorney General. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person relocated or protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served and, in the case of a judgment entered against the relocated or protected person, inform the

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1/ The proposed legislation deals with matters contained in a number of bills that were introduced in the 97th Congress. However, those bills also concerned matters not related to our recommendations. A section number for our proposed legislation is not included because its location in the United States Code would depend on the manner in which such legislation was enacted.

plaintiff whether that person intends to comply with or otherwise respond to the judgment.

"(b) If a judgment in such action is entered against such person, the Attorney General shall take appropriate steps to urge the person to comply with or otherwise respond to the judgment. If the Attorney General thereafter determines that the person is not making efforts to comply with the terms of, or otherwise respond to, the judgment, the Attorney General, upon petition by the plaintiff in the civil action, shall disclose the best known information on the current identity and location of that person if he is unable to determine on the basis of available evidence that (1) the disclosure could likely result in physical harm to the person or (2) the person lacks the ability to comply with the judgment. Any such disclosure or nondisclosure by the Attorney General shall not subject the

not subject the United States to liability in any action based upon the consequences thereof.2/

"(c) Any disclosure under subsection (b) of information relating to the identity and location of a relocated or pro tected person shall be made upon the express condition that further disclosure by the plaintiff may be made only if essential to and in connection with the lawful enforcement of the judgment, and only to such additional persons as is necessary to effect the recovery. Any person who knowingly discloses or uses such information other than in connection with the lawful enforcement of the judgment, in violation of this subsection, shall be guilty of a [misdemeanor] [felony punishable by

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2/ Some courts have examined claims by protected witnesses based on alleged oral agreements and written memorandums of understanding entered into with officials of the United States Government, and have held such agreements not to be enforceable. To protect against the possibility that future agreements, oral and/or written, are entered into and are held to be enforceable, Congress may wish to consider including language in the proposed legislation providing that disclosure or nondisclosure by the Attorney General shall not be considered a breach of any agreement entered into with the person protected. This could be accomplished by adding the following language after "thereof" in paragraph (b): "or be considered a breach by the Attorney General of any agreement entered into with the person protected." In any event, we would recommend that such language be included in legislation if bills, such as those that were introduced in the 97th Congress, which provided for an agreement between the Attorney General and the protected person are enacted. See section 101 of H.R. 7039 (97th Congress) adding a new subsection 3521(c) to title 18, United States Code.

imprisonment of not more than five years] and fined not more than $5000.[3]/

"(d) Any person who has had a court judgment entered in his favor against a person protected or relocated by the Attorney General shall be entitled to a hearing in a United States district court if the Attorney General fails to disclose the information requested as provided in subsection (b). The person may apply for a hearing to the United States district court (A) in which the judgment was entered, or (B) of the district in which the judgment was entered in a State court. A decision by the Attorney General not to disclose information on the current identity and location of a relocated or protected person shall be affirmed unless the court finds that the decision of the Attorney General was arbitrary and capricious. Upon such a finding, the court may enter an order requiring the Attorney General to disclose such information to the person as is necessary to recover under the judgment."

3/ The criminal penalties identified are those contained in two laws for violating prohibitions against disclosing certain types of information. The misdemeanor penalty is contained in the Privacy Act of 1974, 5 U.S.C. 552a(i), and the felony penalty is contained in the Internal Revenue Code, 26 U.S.C. 7213(a)(1). Both laws provide for the $5000 fine. The purpose of including these penalties in the proposed legislation is illustrative. We recommend that action on the proposed legislation include providing for criminal penalties for improper disclosure as Congress deems appropriate.

U.S. Department of Justice

DEC 10 1982

Washington D.C. 20530

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "The Witness Security Program: Changes Needed to Better Protect Civil Interests and Improve Management."

On balance, the General Accounting Office's (GAO) draft report covering the Witness Security Program is a thorough and well researched study of a very sensitive operational and legal area. Further, the report does recognize that Program initiatives have been implemented to specifically address the problem areas identified in the report. While we agree with the recommendations to the Attorney General, we express reservation as to the necessity for the recommendation to the Congress for Federal judicial review of the Attorney General's disclosure decision upon petition by an affected third party. Our comments with regard to the three major areas of the report are discussed below.

DISCLOSURE OF A WITNESS' IDENTITY TO A THIRD PARTY POSSESSING A COURT JUDGMENT

In Chapter 3, the report discusses current Program policy for resolution of civil matters involving relocated witnesses. GAO has recommended that Congress enact legislation which will better recognize the rights of third parties by compelling the Attorney General to disclose the identity of a relocated witness under certain conditions. That portion of the proposal is currently the established policy of the Department. However, there is also included a provision for Federal judicial review to determine whether a disclosure made by the Attorney General was arbitrary and capricious. To this the Department takes exception.

The basis for GAO's recommendation of a judicial review--that inasmuch as the Department administers the Witness Security Program it cannot make a fair decision in determining whether to disclose witness information to a third party--is unsubstantiated. Rather, it is because the Department has access to all relevant information that it should make the final decision. We have proposed, as a means for a judgment creditor to satisfy his or her judgment, the use of a court appointed master who can enforce the judgment in the relocated area. Our research indicates that the court in which judgment was obtained can appoint a master or referee who can, with the appropriate instructions, provide for the security of the witness while performing those

acts necessary to enforce the judgment of the creditor. This approach would require the Attorney General to divulge the witness' location to the master and not to the third party. Without first determining that the new administrative procedures already in place and those under consideration do not adequately address the problem, we believe that judicial review of the Attorney General's disclosure decision could involve the Department in unnecessary and possibly lengthy litigation, further burdening the judicial system. GAO has not given the Department sufficient time to demonstrate that its new policy will alleviate these concerns, nor has GAO demonstrated that judicial review, at great expense to taxpayers, will make a significant change. Moreover, existing statutes provide adequate avenues for judicial review of Departmental decisions in this area. Persons aggrieved by the Department's refusal to provide information could bring a private action under the Civil Rights Act, 42 U.S.C. 1983, or the Freedom of Information Act, 5 U.S.C. 552. Therefore, we question whether further legislation is necessary.

SAFEGUARDS ARE NEEDED TO PROTECT THE PUBLIC FROM UNSCRUPULOUS ACTIONS OF WITNESSES

GAO discusses the difficulty in attempting to balance the need to protect the new identities of witnesses with the need to protect various third parties from the unscrupulous actions of some witnesses. These actions relate to physical harm or illegal activities, child custody and visitation rights, and collection of unpaid debts.

Physicial Harm or Illegal Activities

The GAO report states that ". . . each admission of a witness to the program constitutes a high-risk gamble because no one knows if a witness will successfully adjust to his/her new identity and become a law-abiding citizen." The Witness Security Division recognized the possible potential problem relative to a witness' peaceful assimilation into a new community, especially in light of the fact that over 97% of the Program participants do have criminal backgrounds.

In an effort to predict possible anti-social behavior and also to assist the witness in the difficult process of relocation, the Division contracted this past spring with a team of vocational/behavioral psychologists with considerable experience in individual counseling and personality assessment, to counsel witnesses who have to make difficult relocations. At the time of entry, each witness is administered a variety of questionnaires to evaluate his/her vocational interests and general temperament. The psychologists examine the results of these questionnaires and prepare individual reports for the witness relative to possible avenues of employment, and for the Division relative to any potential adjustment problems the witness may encounter. In some cases, the psychologists may recommend further testing and evaluation. In those instances, the witness personally meets with one of the psychologists for in-depth interviewing and testing. Additionally, the Division requires that these "face-to-face" evaluations be conducted for all witnesses recently released from prison and for those participants with a history of violence or suicide. The Division has also had these evaluations conducted for several individuals who were under consideration for participation in the Program by the Criminal Division's Office of Enforcement Operations to determine their suitability for the Program.

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The results of these professional evaluations have been particularly helpful in assisting both the Headquarters and field staffs of the U.S. Marshals Service in working with "difficult" cases. On the basis of the psychologists' recommendations, the Division has been able to require special supervision for a State murder parolee and counseling for other program participants as a condition of their admission to the Program. In other instances, these evaluations have assisted the witnesses in dealing with their new environments and exploring the options available to them. All in all, these assessments provide the Division with an ability, in many cases, to foresee potential behavioral problems and take corrective actions to protect the public.

In those instances where a Program participant does commit a crime or is suspected of criminal involvement, it has always been the policy of the Marshals Service to assist a State or local law enforcement agency in any legitimate investigation.

When the Marshals Service assists a Program participant with employment, the prospective employer is advised of the nature and extent of the individual's criminal background.

The Marshals Service does not have a custodial relationship with its protectees; such a relationship is not within its legal jurisdiction. However, it is the opinion of the Marshals Service that all individuals who are on parole or probation should be supervised. To that end, an agreement was reached with the Probation Division of the Administrative Office of the U.S. Courts in December 1980, requiring supervision of all Program participants on Federal probation. In January 1982, a similar agreement was established with the United States Parole Commission. The Marshals Service supports legislation presently pending which would require all State parolees and probationers to be supervised.

Child Custody and Visitation Rights

It has been a long-standing verbal policy of the Marshals Service to verify all child custody court orders. This policy was subsequently formalized as a written policy in a memorandum of September 4, 1981. Additionally, in those instances where there is not a court order, the Marshals Service does not relocate minor children without the consent of the non-Program parent.

The Marshals Service realizes that Program relocation does restrict normal visitation. Security considerations, however, do necessitate special procedures. The Division has facilitated many "neutral site" visitations between Program-children and the non-Program parent. Generally, these visits must be in the presence of Marshals Service personnel for obvious security reasons.

Collection of Unpaid Debts

It has been a long-standing policy of the Marshals Service to encourage Program participants to meet their legal responsibilities (e.g. debts, child support, court orders, etc.). Witnesses are advised when they enter the Program that the Marshals Service will not shield them from their obligations. The Marshals Service assists creditors in serving Program participants with any legal process. In those cases where a witness continues to ignore his responsibilities, the Marshals Service, with the concurrence of the Department, advises creditors of the witness' new address and identity to enable the creditor to pursue legal action in the witness' relocation area. The Marshals

Service does not attempt to determine whether or not the witness has sufficient assets to satisfy the judgment, as the GAO report states.

The Marshals Service fully supports those portions of H.R. 7039 relative to witness debts and other legal responsibilities of the Program participants.

MANAGEMENT INFORMATION AND PROGRAM EVALUATION NEEDED

Chapter 4 of the draft report recommends that the Marshals Service and Office of Enforcement Operations develop a comprehensive management information system and procedures to allow for appropriate evaluation of the Witness Security Program. The Department supports these recommendations.

As for the Marshals Service, GAO accurately points out that actions have been and are being taken to improve the organization of its files. Currently, the Witness Security Division is in the process of automating over 4 million witness security documents. Additionally, over the past two years, the Division has designed and implemented computer software programs to facilitate operational and financial activity. Notwithstanding the manpower and financial restrictions of the Division, coupled with the inordinate volume of data, this effort has been successful and proved to be most beneficial to the Headquarters and field staff in planning and controlling Program activities.

In an effort to evaluate its own operation, the Marshals Service has also conducted on-site inspection audits of its Witness Security Headquarters and field operations. These audits have also proved to be most helpful in improving the administrative, as well as operational, aspects of the Program.

The Witness Security Division is also aware that the Office of Enforcement Operations has improved its admission screening process. This improved screening process has also been enhanced by the Division's ability to provide in-depth professional assessment of the potential witness' suitability through its psychologists' evaluations.

As the GAO report also points out, the Office of Enforcement Operations supports the need for a comprehensive management information system, and a study recently completed by the Justice Management Division at the request of the Criminal Division recommends a system to be used by the Office of Enforcement Operations to accomplish this goal. The system is compatible with that of the Marshals Service to minimize costs and allow for interchange of data. The Office of Enforcement Operations has been unable to implement all of the Justice Management Division's recommendations because of budgetary limitations. The Office of Enforcement Operations' staff is doing some statistical gathering but, of necessity at this time, all available resources are devoted to the substantive aspects of the Program. However, efforts to implement the Justice Management Division's recommendations will continue.

* * * * * * * * * *

Except for GAO's recommendation to Congress regarding the enactment of judicial review legislation, we essentially agree with all other GAO recommendations for improving the operation of the Witness Security Program and appreciate the opportunity given us to express such views. We believe the actions we are taking, all of which are in various stages of progress, will meet the objectives of the recommendations set forth in the report. Should there be a need for additional information regarding our response, please feel free to contact me.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2369

WILLIAM FRANZ, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-0173)

Argued October 20, 1982

Decided May 10, 1983

George Kannar for appellants.

William H. Briggs, Jr., Assistant United States Attorney, for appellees. *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth*, *R. Craig Lawrence* and *Jason D. Kogan*, Assistant United States Attorneys, were on the brief for appellees.

Before TAMM, EDWARDS, and BORK, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate Statement, concurring in part and dissenting in part, filed by *Circuit Judge* BORK.

EDWARDS, *Circuit Judge*: At issue in this case is the validity of one aspect of the administration of the federal Witness Protection Program.[1] Exercising the discretion vested in them by statute, various federal officials relocated and changed the identities of a government informant, his wife, and her three children by a former marriage, in return for the informant's testimony against alleged leaders of organized crime. Unfortunately, this routine and otherwise unassailable procedure had the effect of severing the ongoing relationship between the children and their natural father. The father brought the present suit—on behalf of himself and his children[2]—challenging the actions of the federal officials on a variety of constitutional and statutory grounds. He sought declaratory and injunctive relief to enable him to reestablish contact with his children, and damages to compensate all of them for injuries sustained as a result of their separation. The District Court dismissed the complaint for failure to state a claim upon which relief can be granted.[3]

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[1] The statutory authority for the program is found in 18 U.S.C. *prec.* § 3481 (1976).

[2] The latter portion of the suit was predicated on FED. R. CIV. P. 17(c), which authorizes children to sue by their "next friend[s]."

[3] *Franz v. United States*, 526 F. Supp. 126, 129 (D.D.C. 1981). The District Court noted, in addition, that "[t]he plaintiff's [sic] cause of action presents serious procedural problems both as to venue and jurisdiction." *Id.* at 127. However, because the court's decision was founded on its conclusion that the plaintiffs failed to state a claim, we will confine our attention, for the purposes of this appeal, to that judgment. The defendants will have an opportunity on remand to raise any appropriate jurisdictional defenses.

As all parties concede, resolution of this case requires a weighing of three important interests: the public interest in the suppression of organized crime; the interest of the informant, his spouse, and the children in securing protection against the threat of violent reprisal to which they are all exposed; and the interest of the children and their father in maintaining the bonds between them. The essence of the plaintiffs' claims is that, in acting *to sever totally and permanently* the relationships between a non-custodial parent and his minor children without their participation or consent, the defendants struck an impermissible balance of the foregoing interests. Although we reach no judgment on the proper ultimate disposition of this case, we conclude that the plaintiffs clearly have stated a cause of action sufficient to survive a motion to dismiss.

Taking as true the facts alleged in the complaint,[4] we find that the administrators of the Witness Protection Program abrogated the constitutionally protected rights of the plaintiffs to one another's companionship without (1) affording the father requisite procedural protections, (2) making a particularized finding and showing of a legitimate state interest sufficient to justify the infringement, or (3) availing themselves of equally effective alternative solutions to the problem before them that would have been less restrictive of the plaintiffs' rights. Accordingly, we reverse and remand for further proceedings.[5]

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[4] We are, of course, bound to make such an assumption for the purpose of reviewing the District Court's judgment that the plaintiffs failed to state a claim. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967). We express no view regarding the veracity of the plaintiffs' allegations.

[5] As to the only other claim asserted below that the plaintiffs press on appeal, we conclude that dismissal was proper. The plaintiffs insist that the Attorney General lacks the express statutory authority he would need to "federalize"

I. Background

A.

The Witness Protection Program was established as part of the Organized Crime Control Act of 1970.[6] Its

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the aspect of domestic-relations law implicated in this case. *See Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981). Assuming, *arguendo*, that the Attorney General needed such authority to effect the kind of incidental, *de facto* displacement of state law at issue here, he possessed it. *See* note 7 *infra* and accompanying text.

[6] Pub. L. No. 91-452, §§ 501-504, 84 Stat. 922, 933-34. For the current codification of the provision, see note 1 *supra*. The full text of the statute reads:

> Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.
>
> Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.
>
> Sec. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The

purposes are to guarantee the safety of government witnesses who agree to testify against alleged participants in organized criminal activity and thereby to create an incentive for persons involved in such activities to become informants. Broad discretion is vested in the Attorney General "to provide for the security of" such witnesses.[7]

It was originally contemplated that the program would be implemented principally through the purchase and maintenance of housing facilities that would serve as more or less permanent havens for witnesses and their families.[8] That approach soon proved impracticable and the strategy was adopted of relocating witnesses and their families and providing them with "new identities, the documents to support these new identities, as well as housing, employment, medical services and other social services." [9]

The Attorney General has delegated to the United States Marshals Service virtually all of his authority

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offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

SEC. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

[7] *See* § 501, set forth in note 6 *supra*.

[8] *Witness Security Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 242 (1980) (statement of Howard Safir, Assistant Director for Operations, U.S. Marshals Service, Acting Chief, Witness Security Section) [hereinafter cited as 1980 *Hearings*].

[9] *Id.*

over the actual administration of the program.[10] But decisions regarding who will be accepted into the program are still made by certain direct subordinates of the Attorney General. An Order promulgated by the Justice Department in 1975 provides that a recommendation to admit a prospective witness must be made by a U.S. Attorney or Assistant U.S. Attorney and approved by the Assistant Attorney General in charge of the concerned division.[11] Only after this screening process has been completed is the Marshals Service notified and instructed to prepare for the induction of the witness.[12]

The Justice Department Order also prescribes criteria by which prospective inductees are to be evaluated. The Assistant Attorney General is instructed to admit a "proposed witness" into the program only upon satisfaction of the following conditions:

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[10] *See* 28 C.F.R. § 0.111(c) (1982) (instructing the Director of the Marshals Service to make "[p]rovision for the health, safety, and welfare of Government witnesses and their families pursuant to sections 501-504 of Pub. L. 91-452"). Essentially the same regulation was in effect at the time the informant and his family were admitted into the program. *See* 28 C.F.R. § 0.111(c) (1977) (revised as of July 1, 1977). *See also* Affidavit of Howard Safir, ¶ 2, Appendix ("App.") 62.

[11] Justice Department Order OBD 2110.2, Jan. 10, 1975, at 1-3, *reprinted in Witness Protection Program: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 134-36 [appendix 2] (1978) [hereinafter cited as 1978 *Hearings*].

[12] *Id.* at 136. Although, as indicated, the Marshals Service does not participate in the decision whether a prospective witness qualifies for admission, individual "inspectors" in the Service do appear to make recommendations regarding "whether or not the subject will be a workable case"—*i.e.*, "whether or not [the Service] can handle it." 1980 *Hearings* at 244 (testimony of Howard Safir). These recommendations are forwarded to the "Office of Enforcement Operations" at the Justice Department, which decides whether to "approve" the witness for the program. *Id.*

(1) The person is a qualifying witness in a specific case in process or during or after a grand jury proceeding,

(2) Evidence in possession indicates that the life of the witness and/or that of a member of the witness' family or household is in immediate jeopardy, and

(3) Evidence in possession indicates it would be advantageous to the Federal interest for the Department to protect the witness and/or a family or household member.[13]

These criteria, it will be observed, make no mention of the impact of the admission of a witness and his "family or household" on established relationships between members of that household and other persons (*e.g.*, natural parents); the Assistant Attorney General is to consider only the advantage to the "Federal interest" of accepting each candidate, not the effects upon the interests of third parties.[14]

Nor does it appear that peripheral familial rights are taken into account at any other point in the standard admission procedure or in the subsequent administration of a case. The one apparent (and partial) exception to this generalization turns out, in practice, to be illusory. At the time of their induction, all witnesses and adult

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[13] Order OBD 2110.2, *supra* note 11, at 1-2, *reprinted in* 1978 *Hearings* at 134-35.

[14] The Justice Department Order does direct U.S. Attorneys "in the field," when making a recommendation to the Assistant Attorney General of the concerned division that a particular candidate should be admitted, to specify, *inter alia*, the "[n]umber of family and/or household members to be authorized funding (name, age, relationship)." Order OBD 2110.2, *supra* note 11, at 3, *reprinted in* 1978 *Hearings* at 136. But the language of the directive strongly suggests that the only relevance of the information is to assist the authorizing agent in estimating the probable cost of admitting and supporting the witness and his household.

members of their households are required to read and sign a lengthy "Memorandum of Understanding." [15] The document includes the following provisions: a warning by the Marshals Service that it "*WILL NOT SHIELD* witnesses from civil or criminal litigation initiated prior to or subsequent to entry into the Program"; [16] a mandate that "[a]ll court orders which are directed to the witness must be immediately brought to the attention of the . . . Marshals Service" (combined with a strong suggestion that the Service will assist in their enforcement); [17] and a form authorizing either the Marshals Service or a named party to receive service of process on behalf of the witness.[18] These provisions might be interpreted as requirements that participants in the program abide by judicially ratified familial rights of third parties. Indeed, a former Director of the Marshals Service testified in 1978 that it was the current "policy" of the Service to "work to secure some accommodations so the rights of [a non-relocated parent] are protected"—specifically, to "make [the children] available [for visitation] if the circumstances are proper." [19] However,

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[15] The Memorandum itself is reprinted as Exhibit 29 of the 1978 *Hearings* at 230-51. The procedure whereby it is presented and explained to prospective entrants is described in 1980 *Hearings* at 243-44 (testimony of Howard Safir).

[16] Memorandum of Understanding at 3, *reprinted in* 1978 *Hearings* at 233 (emphasis in original).

[17] Memorandum of Understanding at 7, *reprinted in* 1978 *Hearings* at 237. The provision specifically mentions "[c]ourt orders which grant custody of minor children to persons other than a witness who is being relocated" and insists that such orders "will be honored and said minor children *WILL NOT* be relocated in violation of the . . . order." *Id.* (emphasis in original). It contains no comparable reference, however, to decrees awarding visitation or other non-custodial familial rights to a person who is not being relocated.

[18] Memorandum of Understanding at 15, *reprinted in* 1978 *Hearings* at 245.

[19] 1978 *Hearings* at 123 (testimony of William E. Hall).

such a "policy" certainly was not implemented in this case.[20] And the defendants did not suggest, either in their brief or at oral argument, that the Service makes any affirmative effort to afford non-custodial parents access to their relocated children.[21] We are compelled to conclude, therefore, that the character and strength of familial relationships between members of a witness' household and third parties who will not be relocated are given no formal consideration either by the Justice Department officials responsible for deciding whether to admit a candidate and his "family or household" into the Witness Protection Program or by the administrators of the Marshals Service when deciding how any given case should be handled.

B.

Partly because of the preliminary stage at which the suit was dismissed, the circumstances out of which this action grows are not entirely clear. The following is a rough outline of the pertinent facts, assuming all allegations in the plaintiffs' complaint are true.

In 1966, William Franz married Catherine Mary Franz. In the ensuing years, the couple had three children: William Michael Franz, Christine Catherine Franz, and Donna Marie Franz. Sometime thereafter the couple separated. In February 1974, a Pennsylvania court awarded William visitation rights; Catherine appears to have had or been awarded custody of the chil-

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[20] *See* text at notes 25-27 *infra*.

[21] Further evidence that the "policy" of the Marshals Service differs markedly from Hall's representations is provided by the burgeoning number of suits involving claims similar to those presented here. *See, e.g., Ruffalo v. Civiletti*, 539 F. Supp. 949 (W.D. Mo. 1982), *aff'd*, Nos. 82-1779 & 82-1893 (8th Cir. March 17, 1983); *Grossman v. United States*, 80 Civ. 5589 (S.D.N.Y. dismissed without prejudice March 23, 1982).

dren.[22] Between 1974 and 1978, William regularly exercised his right to visit his offspring.[23] On July 9, 1976, William and Catherine were divorced.

Sometime prior to the divorce, Catherine "developed a personal relationship" with (and later may have married) one Charles Allen.[24] Allen subsequently confessed himself to be a contract killer in the employ of leaders of organized crime in the Philadelphia area. He offered to testify in a federal criminal trial in return for the relocation and protection of himself, Catherine, and Catherine's three children. The Assistant Attorney General of the Criminal Division of the Department of Justice approved the arrangement, and in February 1978, Allen and the members of his household were accepted

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[22] Since the decision below, a dispute has arisen between the parties as to whether William was, in fact, awarded visitation rights by the state court. *Compare* Appellees' Brief at 5 n.7 *with* Appellants' Reply Brief at 4 n.1. It appears that no record of a visitation order can be found. The issue is further complicated by the possibility, raised by the plaintiffs, that William's legal rights would be even more extensive in the absence of a formal order allocating custody and visitation privileges than they would be under such an order.

We refrain from exploring this narrow but complex question for two reasons. First, the District Court assumed that William had been granted visitation rights, *see Franz v. United States*, 526 F. Supp. at 127, and we confine ourselves for the purposes of this appeal to the facts on which the court relied. Second, our disposition of the case does not turn upon nuances of the legal entitlements secured by William. *See* text at notes 74-87 *infra*.

[23] Complaint at 4, *reprinted in* App. 8.

[24] The character of the liaison between Catherine and Allen is not entirely clear. The plaintiffs allege their marriage only "upon information and belief." *Id.* However, we do not consider the formal status of their relationship particularly important.

into the Witness Protection Program.[25] We assume that Allen and Catherine read and signed a copy of the Memorandum of Understanding described above.[26] On February 12, the Marshals Service transported Allen, Catherine, and the children from Sewell, New Jersey to an undisclosed location and provided them with new identities.

Since that date, William has been attempting, in a variety of ways, to determine the whereabouts of or to establish contact with his three children. He has repeatedly requested information from the Marshals Service. He has written his former wife (care of the Marshals

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[25] The plaintiffs have consistently maintained that Allen and his family were admitted into the program in February 1978. *See, e.g.*, Complaint at 5, *reprinted in* App. 9. For the purpose of this appeal, we assume that date is accurate. The affidavit of Howard Safir, Assistant Director of Operations, United States Marshals Service, however, indicates that, according to his records, Allen was admitted in February 1979. App. 62-63. If this suit ever threatens to terminate in an award of damages, it will of course be necessary to determine the correct date of admission.

[26] The plaintiffs' complaint does not specifically allege that Allen and Catherine read and signed the Memorandum. However, the following combination of circumstances prompts us to assume that they did so: (i) The Acting Chief of the Witness Security Section of the Marshals Service insisted in congressional hearings that all inductees are shown and agree to abide by the Memorandum, *see* note 15 *supra* and accompanying text; (ii) the plaintiffs in their brief to this court cited some of the provisions of the Memorandum, apparently assuming agreement thereto by Allen and Catherine, *see* Appellants' Brief at 7-8, and the defendants did not contest the plaintiffs' reliance on the document; (iii) the plaintiffs' lack of first-hand knowledge that Allen and Catherine agreed to the terms of the Memorandum is readily explainable by the fact that the policy of the Marshals Service is to retain the signed documents and keep them confidential. *See* Memorandum of Understanding at 21, *reprinted in* 1978 *Hearings* at 251. On remand, the defendants will have an opportunity, if they wish, to challenge our assumption.

Service) pleading his case. And, most recently, he has initiated litigation.[27]

The administrators of the program have not been wholly unresponsive. They have, by their own account at least, delivered William's letters to Catherine. But they appear not to have put any pressure on either Allen or Catherine to reveal to William the location of the children or otherwise to accommodate William's desires. And they have not attempted to devise any system for reconciling the conflicting interests of the affected parties. Officials of the Marshals Service acknowledge that they are capable of arranging meetings between William and his children without endangering Allen, Catherine, or the children,[28] but they refuse to establish such contacts without her consent.

II. State Action

Before turning to the assessment of the plaintiffs' various claims of constitutional violation, we must resolve a threshold question. The defendants argue that, however unfortunate the plaintiffs' injuries, they are not legally responsible for those harms. The defendants point out that it is Catherine who has decided to deny William access to his children. The defendants also insist that they have done nothing more than decline to compel

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[27] Named as defendants in the suit are: the United States; the Department of Justice; the Marshals Service; former Attorney General Benjamin Civiletti; Attorney General William French Smith; Marshals Service Director William E. Hall; unknown agents of the Marshals Service; and Charles Allen. The government officials are all sued individually and in their official capacities.

[28] The defendants make this acknowledgment explicit in their brief to this court, Brief at 16, and their counsel confirmed that position at oral argument. The defendants' position is consistent with previous representations made by officials of the Marshals Service. *See* 1978 *Hearings* at 122-23 (testimony of William Hall and Arthur Daniels, Chief, Witness Security Division).

her to behave otherwise. For two reasons, they contend, such inaction cannot expose them to liability under the Constitution. First, they claim they lack the authority to do otherwise; they have no power, in other words, to force Catherine to accede to visitation of the children by William. Second, they argue that, even if they had such authority, their refusal to exercise it would not be a sufficiently affirmative or efficacious act to make them responsible for the consequences of Catherine's behavior.

The defendants' first argument gives us little pause. Whatever may be the legal or equitable limits on the defendants' coercive authority, arising out of the terms of the Memorandum of Understanding or other agreements entered into by the Marshals Service and Allen and Catherine,[29] the defendants clearly had the authority, at the time they consented to the admission of Allen and his household, to insist that the inductees agree to accommodate in some way the rights of William and the rights of the children to see their natural father. The Memo-

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[29] It should be noted, the Memorandum of Understanding expressly provides that,

> since it is within the Attorney General's discretion to approve participation in the Program, the witness may be terminated from the Program when the Attorney General determines that the life or person of the witness is no longer in danger, *or for other reasons deemed appropriate* by the Attorney General or his representative.

Memorandum at 2, *reprinted in* 1978 *Hearings* at 232 (emphasis added). Although these provisions lend support to certain of the plaintiffs' claims, we are not insensitive to the defendants' arguments that their insistence at this late date that Catherine respect William's visitation rights might breach some implied promises made to the inductees that they would be guaranteed absolute anonymity indefinitely if they abided by the terms explicitly set forth in the Memorandum, and that such a breach might adversely affect the credibility of the Service in the future. From the plaintiffs' perspective, however, there remains a question whether the defendants may ever enter into such an agreement where a direct effect thereof is to totally and permanently abrogate all relationships between a non-custodial parent and his children.

randum of Understanding contains several structurally similar provisions. The admittees undertook, for example, to stay away from the "danger area" unless they had the permission and protection of the Service [30] and to permit the Service (or a designated substitute) to accept service of process on their behalf.[31] The sanction for violation of these and other clauses is "termination" from the program. Those provisions are undoubtedly valid and enforceable; the discretion vested in the Attorney General by statute [32] is broad enough to enable him or his representative to insist upon obedience to such terms as a condition of admission into and continuation in the program. In short, the defendants plainly cannot absolve themselves of responsibility on the ground that they have no authority to do what the plaintiffs demand.

The defendants' second contention, albeit also without merit, warrants a somewhat more extended response. To evaluate it, we must venture into a sometimes obscure area of constitutional law: the doctrine relating to the degree to which a private party's behavior must be instigated by or dependent upon the exercise of governmental authority to justify attribution of the consequences of that behavior to "state action." [33] Decisions involving this issue tend to turn upon nuances in the peculiar "facts and circumstances" of the case at hand [34]

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[30] Memorandum of Understanding at 3, *reprinted in* 1978 *Hearings* at 233.

[31] Memorandum of Understanding at 15, *reprinted in* 1978 *Hearings* at 245 (discussed in the text at note 18 *supra*).

[32] *See* §§ 501, 502, *reprinted in* note 6 *supra*.

[33] The phrase "state action" is used here in its generic sense, to refer to action by any level of government, from local to national. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147 n.2 (1978). At issue in the present case is action by officials of the federal government, but doctrine developed in the context of suits involving conduct by state and municipal bodies and officials is directly relevant.

[34] *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725-26 (1961).

and, thus, often are unusually difficult. Fortunately, the present suit does not present especially troublesome questions. Viewed from any of a number of perspectives, the conduct of the defendant officials is seen to be sufficient to establish a constitutionally significant link between the government and the alleged infringement of the plaintiffs' rights. [35]

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[35] The fact that the suit is brought against the defendant officials and not against Catherine arguably might affect our analysis. It has been suggested that the content of the test for determining whether there has been "state action" in situations like the present ought to vary depending on whether relief is sought against the government or the private actor. *See* Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.-C.L. L. REV. 97, 116-19 (1976) (advocating a lower "required level of significance" when the remedy sought is termination of the government's involvement in the activity). And a few cases seem to suggest that some kind of distinction along these lines is appropriate. *See Blum v. Yaretsky*, 102 S. Ct. 2777, 2786 (1982) (stressing the importance of finding a "nexus" between the state and the challenged action in a situation in which the plaintiff seeks to hold the state liable for the behavior of a private party) ; L. TRIBE, *supra* note 33, at 1148 n.7 (suggesting some such differences might be extracted from the case law). The advocates of a two-level doctrine related to the status of the defendant are not without opponents, however. *See* McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 802 (1978). And, for the most part, decisions by the Supreme Court do not seem to turn upon whether a government or a private party would be affected by successful prosecution of the suit in question. *Compare, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-58 (1974), *with, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-79 (1972) (elaborating essentially identical "state action" theories despite the fact that the former sought to require a privately-owned utility to continue service while the latter sought to require a government agency to revoke the liquor license of a private club). In short, we do not think that the fact that the defendants in the instant suit are governmental officials requires that the case be accorded either specially stringent or specially lenient treatment.

It is clear that the defendants, by accepting Catherine and the children into the program along with Allen, are largely responsible for the success of Catherine's effort to deny William access to his offspring. Without the aid of the administrators of the program in providing her with a new identity, Catherine almost certainly would not have been able to frustrate William's attempts to exercise and enforce his visitation rights; with that aid, she has been able to act with impunity. Such a potent contribution to the ability of one private party to infringe the legal interests of another by itself might be sufficient to give rise to "state action." [36]

But there is more: this is not a case in which the government has merely provided general financial or other aid to a private party, without which he would have been unable to act as he did; rather, there is a close "nexus" between the content of the government's aid and the specific behavior that is challenged in the suit.[37] The

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[36] *Cf. Norwood v. Harrison*, 413 U.S. 455, 466 (1973) (Granting financial aid to a private party under circumstances in which "that aid has a significant tendency to facilitate, reinforce, and support private discrimination" constitutes impermissible state action.) ; *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (When a State "cast[s] its electoral process in a form which permits a private organization to practice racial discrimination in the election," it "makes the action of the [private organization] the action of the State.") (alternative rationale).

[37] In recent years, the Supreme Court has emphasized the importance of the existence of a "nexus" of this sort, particularly when the subjection of a private actor to regulation or guidance by the state is the alleged source of "state action." *See Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351 ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be

nexus is formed principally by the defendants' encouragement and support of Catherine's decision to hide the children from William.[38] To some extent, such encouragement is embodied in the terms of the Memorandum of Understanding by which Allen and his household were informed of the nature of the program. Thus, signatories are obliged to "acknowledge[] the necessity to terminate correspondence, where possible, with persons known prior to entry into the Witness Security Program for reasons of security" [39] and generally not to act in any way that might "jeopardize[] the witness' security";[40] such un-

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treated as that of the State itself."); *Blum v. Yaretsky*, 102 S. Ct. at 2786 (quoting the foregoing language from *Jackson*).

[38] The encouragement of Catherine's choice may well be the most important factor in this case. If state action reliably may be found upon the identification of any one factor, that factor is significant governmental promotion of the specific conduct by the private actor that allegedly has abrogated the plaintiff's rights. *See Blum v. Yaretsky*, 102 S. Ct. at 2786 ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); *Rendell-Baker v. Kohn*, 102 S. Ct. 2764, 2771 (1982) (quoting the foregoing language from *Blum*); *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357 n.17 (emphasizing the fact that "there is no suggestion in this record that the [government agency] intended either overtly or covertly to encourage the [private actor's] practice"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. at 176-77 (refusing to find state action where governmental regulation "cannot be said to in any way foster or encourage racial discrimination"); *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (an ostensibly neutral state constitutional amendment that, in practice, "will significantly encourage and involve the State in private discriminations" held to be state action).

[39] Memorandum of Understanding at 8, *reprinted in* 1978 *Hearings* at 238.

[40] Memorandum of Understanding at 3, *reprinted in* 1978 *Hearings* at 233.

dertakings may well have made Catherine more reluctant than she otherwise would have been to keep open the channels of communication with her former husband.[41] But more importantly, encouragement of the challenged behavior inevitably has been generated by the structure of the program. The defendants have placed Catherine in a position where any effort by her to accommodate William's and the children's reciprocal rights—at least in the absence of active assistance by the Marshals Service in ensuring the secrecy and security of contacts—may well endanger the lives of her spouse, her children and herself.[42] It is hard to imagine a more powerful kind of impetus.

There is yet a third theory upon which a finding of "state action" may be based. This case involves a situation in which the plaintiffs' claims are founded in significant part upon state law governing family relationships. In particular, William asserts certain rights under Pennsylvania law to maintain contact and visitation with his minor children. *See* note 22 *supra.* Catherine clearly had no power or authority under applicable state law to

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[41] It might be responded that other provisions in the Memorandum seem to urge or even require compliance with outstanding court orders. *See* notes 16-18 *supra* and accompanying text. But a closer reading suggests that those terms are concerned principally with the settlement of outstanding claims, not with the preservation of adjudicated familial rights, and they appear consistently to have been so interpreted by the Marshals Service. *See* text at notes 20-21 *supra.*

[42] The inducement of such sentiments cannot be dismissed on the ground that they are unfortunate by-products of a program generally designed to foster the safety of all concerned. That argument goes to the question whether the particular application of the program at issue here can survive constitutional scrutiny, not to the question whether there has been sufficient "state action" to subject it to constitutional examination.

enter into an arrangement with another private party to modify or vitiate the rights of William and her children to maintain their relationship. Thus, when Catherine entered the Witness Protection Program, pursuant to an agreement with the defendants, she accomplished something that was not otherwise legally achievable absent the formal intervention of the federal government. Thus viewed, this is a classic case of "government action," where a "federal statute is the source of the power and authority by which . . . private rights are lost or sacrificed. . . . The enactment of the federal statute authorizing [the federal Witness Protection Program] . . . is the governmental action on which the Constitution operates . . . ." *Abood v. Detroit Board of Education*, 431 U.S. 209, 218 n.12 (1977) (quoting *Railway Employes' Department v. Hanson*, 351 U.S. 225, 232 (1956)).

Expanding our field of vision somewhat, we observe that the defendant officials and Allen and his household also are involved in a symbiotic relationship. Not only are they joint participants in a program from which they all benefit, but the advantages reaped by each group are dependent upon the activities of the other. Thus Allen, Catherine, and the children obtain protection from retaliation by organized crime, and Catherine gains the ability, in practice, to keep the children for herself. The defendants (on behalf of the government in general) not only gain the testimony provided by Allen, but also benefit from the incentive, created by their demonstrated ability to shield Allen and his household, for other potential witnesses to come forward with evidence against organized crime. To some extent, moreover, that incentive is arguably strengthened by Catherine's decision to deny William access to the children; the greater the government's ability to portray the Witness Protection Program as one in which participants are free to start a completely new life, unfettered by any prior commitments, the more effective will be their effort to recruit other informants in the future.

Interdependence of the kind just described between the government and a private actor has been held to warrant attribution to the government of the conduct of the private party.[43] This "joint-venture" doctrine derives partly from the principle that, having not only countenanced but benefited from behavior alleged to have infringed private interests, the state must accept responsibility for the injury.[44] And partly it is founded on a recognition of the probable symbolic impact of such mutually beneficial activities; the state ought not to be permitted to disclaim responsibility for the consequences of conduct with which, in the eyes of the public, it appears to be intertwined. Both of these considerations are clearly applicable to the instant case.

Finally, we note that, in this case, the symbolic impact of the mutually beneficial activities is accentuated by the overt participation by government officials in the actions that resulted in the concealment of the children.[45] Officers

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[43] *See Moose Lodge No. 107 v. Irvis*, 407 U.S. at 175, 177 (dicta); *Burton v. Wilmington Parking Auth.*, 365 U.S. at 724-25.

[44] *See Burton v. Wilmington Parking Auth.*, 365 U.S. at 724.

[45] In deciding "state action" questions, the Supreme Court has frequently attended to the presence or absence of overt participation by state officials (executive or judicial) in the activities that eventuated in the asserted injury. *See Lugar v. Edmondson Oil Co.*, 102 S. Ct. 2744, 2754-57 (1982); *Rendell-Baker v. Kohn*, 102 S. Ct. at 2770 n.6; *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10 (1978); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152, 155-56 (1970); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). The Court has never made clear why such involvement, particularly when it is only ministerial in nature, should be important—why it makes a difference, for example, whether attachment of property pursuant to a state statute is effected with or without the nondiscretionary assistance of a clerk of court and county sheriff, *compare Lugar v. Edmondson Oil Co.*, 102 S. Ct. at 2754-57, *with Flagg Bros. v. Brooks*, 436 U.S. at 160 n.10. As sug-

of the Marshals Service obviously were heavily involved in the initial relocation of Allen and his household and they have assisted in various ways in keeping their whereabouts secret. Through such participation, the defendants at least seem to have lent their imprimatur to all efforts by Allen or Catherine to cut themselves off from people who figured in their past lives. Such apparent ratification and support add to our willingness to subject the defendants' conduct to constitutional scrutiny.

In short, many analytical roads lead to the same conclusion: the defendants are constitutionally accountable for the alleged injury to the plaintiffs.[46] We now turn to that accounting.

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gested in the text, we think the explanation is to be sought in the symbolic effect of such participation. The Constitution was designed to embody and celebrate values and to inculcate popular acceptance of them, as much as to compel governments to abide by them. *See* THE FEDERALIST No. 49, at 349 (J. Madison) (B. Wright ed. 1961); J. Madison, Speech before the House of Representatives (defending his draft of the Bill of Rights) (June 8, 1789), *reprinted in* THE MIND OF THE FOUNDER 221 (M. Meyers ed. 1973); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 207. Over the course of our history, the Constitution has continued to fill those various roles, *see* Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937)—arguably, (at least recently) to our considerable benefit. It is thus appropriate, even essential, that, when expounding the Constitution, we be alert to situations in which a government, by sanctioning activities by a private party that it is forbidden to do directly, undermines the "constitutive" function of the document. Ministerial involvement of governmental officials is relevant to a "state action" inquiry, in other words, because it increases the likelihood that government will be perceived as approving of the private actor's behavior and the values that underlie it.

[46] Our conclusion is consistent with that recently reached by the Eighth Circuit in *Ruffalo v. Civiletti*, Nos. 82-1779 & 82-1893, slip op. at 10-12 (8th Cir. March 17, 1983).

We limit ourselves to the finding that there has been "state action" in some form in this case—*i.e.*, that the defendants, col-

III. Constitutionally Protected Interests

It is beyond dispute that "freedom of personal choice in matters of family life is a fundamental liberty interest" protected by the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[47] That freedom encompasses a wide variety of choices and activities: the decision to marry;[48] procreation;[49] the use of contraception;[50] the decision not to carry a child to term;[51] and cohabitation with members of one's extended family.[52] Among the most

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lectively, may not absolve themselves of responsibility merely by asserting that they are doing nothing more than respecting the uncoerced wishes of Catherine. We express no opinion on the question of *which* of the defendants are responsible for what aspects of the injuries to the plaintiffs. See note 12 *supra* and accompanying text for a portion of the complex and as yet unclear factual foundation of the latter issue.

[47] *See also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (dicta); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842 (1977) (dicta); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (dicta); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The question of what the constitutional "protection" of this freedom entails is taken up in Part IV. *infra*.

[48] *See Zablocki v. Redhail*, 434 U.S. 374, 383, 386 (1978).

[49] *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[50] *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

[51] *See Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

[52] *See Moore v. City of East Cleveland*, 431 U.S. at 500-06 (plurality opinion).

It has been suggested that these various "familial rights" are too disparate to be fairly lumped together and that, indeed, to conflate them is dangerously to obscure differences in their status and strength. We express no opinion on the merits of the charge; in particular, we do not mean to imply that our discussion of the protections that must be accorded

important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship.[53]

The constitutional interest in the development of parental and filial bonds free from government interference has many avatars. It emerges in a parent's right to control the manner in which his child is reared and educated [54] and in the child's corresponding right not to have the content of his instruction prescribed by the state.[55] It contributes heavily to a parent's right to direct the religious upbringing of his child.[56] And, above all, it is manifested in the reciprocal rights of parent and child to one another's "companionship." [57]

When asserted by a parent and child in a traditional nuclear family, the foregoing rights are acknowledged to be potent. It might be argued, however, that they are less formidable when asserted by a non-custodial parent —one who retains and regularly exercises "visitation rights" but who participates little in the day-to-day care and nurturing of his children.

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the reciprocal interests of parent and child in one another's companionship, *see* Part IV. *infra,* is equally applicable to other "familial rights."

[53] *See Quilloin v. Walcott,* 434 U.S. at 255 (dicta) ; *Wisconsin v. Yoder,* 406 U.S. 205, 232-33 (1972) ; *Stanley v. Illinois,* 405 U.S. at 651; *Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977).

[54] *See Parham v. J.R.,* 442 U.S. 584, 602-04 (1979) ; *Ginsberg v. New York,* 390 U.S. 629, 639 (1968) ; *Prince v. Massachusetts,* 321 U.S. at 165-66 (dicta) ; *Pierce v. Society of Sisters,* 268 U.S. at 534-35; *Meyer v. Nebraska,* 262 U.S. at 401.

[55] *See Prince v. Massachusetts,* 321 U.S. at 166 (dicta).

[56] *See Wisconsin v. Yoder,* 406 U.S. at 233.

[57] *See Stanley v. Illinois,* 405 U.S. at 651; *Duchesne v. Sugarman,* 566 F.2d at 825.

To assess that argument we turn first to the case law. That inquiry unfortunately proves inconclusive; while the bulk of the pertinent precedent seems to suggest that we should not differentiate between custodial and non-custodial contexts when deciding what protections are constitutionally due a parent-child relationship, each of the germane cases has dealt with a factual situation or legal issue significantly different from the problem before us.

Dicta favorable to the plaintiffs may be found in *Quilloin v. Walcott*, 434 U.S. 246 (1978). Justice Marshall, speaking for a unanimous Court, seemed to imply that "a [once] married father who is separated or divorced from the mother and is no longer living with his child" could not constitutionally be treated differently from a currently married father living with his child. *Id.* at 255-56.[58] That suggestion is reinforced by some language in two of the Court's decisions dealing with the procedural adequacy of state laws making possible the termination of interests of non-custodial parents. In *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965), the Court took for granted that the interest of a divorced father in the preservation of his visitation rights is a "liberty interest" sufficient to trigger the application of procedural due process doctrine. And in *Santosky v. Kramer*, 455 U.S. at 749, 753-54, decided last term, the Court expressly held that the interest of a parent, who has temporarily lost custody of his child, in avoiding elimination of his "rights ever to visit, communicate with, or regain custody of the child" is important enough to entitle him to the procedural protections mandated by the Due Process Clause. The relevance of these two decisions

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[58] The holding in the case was that the Equal Protection Clause did *not* bar differential treatment of a married father and a father who "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.*

to the instant case is limited by the fact that the establishment of a "liberty interest" sufficient to warrant application of procedural due process doctrine does not necessarily mean that that interest will be deemed "fundamental" and thereby entitled to the full panoply of substantive constitutional protections. Nevertheless, the Court's willingness, in each case, to assimilate the interests at stake to the rights enjoyed by custodial parents[59] affords some support for the proposition that, for constitutional purposes, all (exercised) parental rights should be treated as equivalent.[60]

Some language inconsistent with that proposition may be found in the two decisions rendered by the Second

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[59] *See Santosky v. Kramer,* 455 U.S. at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."). *See also Lassiter v. Department of Social Servs.,* 452 U.S. 18, 27 (1981) (dicta) (describing "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' " (in a context very similar to that in *Santosky*) as "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection' ") (quoting *Stanley v. Illinois,* 405 U.S. at 651, a case involving the rights of an illegitimate father who had lived with and supported his children all their lives, *id.* at 650 n.4).

[60] *See also Wise v. Bravo,* 666 F.2d 1328, 1338 (10th Cir. 1981) (Seymour, J., concurring in the result) (dicta); *Ruffalo v. Civiletti,* 539 F. Supp. 949, 952 (W.D. Mo. 1982) (holding, in a case very similar to that before us, that "visitation rights are entitled to due process protection [substantive as well as procedural], at least when the challenged governmental interference is of a serious, continuing nature"), *aff'd on other grounds,* Nos. 82-1779 & 82-1893, slip op. at 7-8 (8th Cir. March 17, 1983) (proceeding on the assumption that the plaintiff parent had a legal right to custody of the children, and consequently declining to "decide whether a parent's visitation rights are constitutionally protected").

Circuit in the only appellate case comparable to the one before us. In *Leonhard v. Mitchell*, 473 F.2d 709 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973), a father in a position similar to that occupied by William sought a writ of mandamus compelling the Marshals Service to reveal to him the whereabouts of his children. The court ruled that, in view of a state's "substantial range of authority to protect the welfare of children . . . [which] extends to the determination of parental custody and visitation rights," there is no "*clear* constitutional right to custody or visitation rights." *Id.* at 713 (emphasis added). In *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981), a subsequent damage action growing out of the same controversy, the court concluded "that the federal officials' removal and concealment of the children on the consent of their mother and sole custodian, did not violate the children's constitutional rights . . . ." *Id.* at 620.

However, the differences between the *Leonhard* cases and the suit before us are sufficiently marked that the foregoing comments bear only lightly on the question with which we are grappling. Most importantly, in *Leonhard* there was no suggestion that the Marshals Service was capable of arranging secret meetings between the father and the children without endangering anyone's life; the court of appeals thus assumed that the defendants' only option, if they wished to protect the children, was to deny the father access to them. In the first case, the court's inquiry was further circumscribed by the nature of the remedy sought; presented with a stark choice between granting or denying an order that would reveal the location of the children, the court not surprisingly was reluctant to accord much weight to the plaintiffs' constitutional claims. In the second suit, the court's attention was deflected from the main issue by a different set of circumstances: the father's constitutional claims were, by then, time-barred and the children had been returned to him. The only remaining relevant question was whether the children were entitled to damages for the

violation of their rights during the period in which they had been denied the company of their father. The court concluded that the defendants, when deciding whether to reveal the location of the children, were entitled to rely on the (putatively reliable) judgment of the mother concerning what was necessary to ensure their safety. In this action, by contrast, a safe way of affording the father access to the children does exist, the question whether the defendants should make use of it is properly before us, and the mother's awareness of the option undermines any presumption that she is acting solely in the best interests of her offspring. In short, the reflections of the Second Circuit are sufficiently intertwined with the idiosyncracies of the cases before it as to be of little moment in the present context.

To summarize, the balance of germane precedent inclines in favor of according similar constitutional status to custodial and non-custodial parent-child relations, but none of the cases is controlling. Consequently, to assess fairly the strength of the interests asserted by the plaintiffs in this case we must explore the concerns that underlie the constitutional protection traditionally accorded parental and filial bonds.

Three considerations account for the skepticism with which, when determining the constitutional validity of governmental action, we regard any interference with parent-child relations. The first is the important place such relations have long held in our culture. In the United States, parents historically have participated heavily in the rearing of their children.[61] More importantly, per-

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[61] The Supreme Court made this point most vigorously in *Wisconsin v. Yoder,* 406 U.S. at 232:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

The argument is somewhat overstated. In the early years of the settlement of this country, for example, many parents

sons in this country traditionally have believed that parents have a *right* to maintain contact with and shape the development of their children.[62]

The second factor consists of recognition that shielding relations between parents and children serves two complementary social functions. On one hand, it facilitates socialization of the children. We rely on parents

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(particularly in the northern colonies) adhered to the practice common among English Puritans of "putting out" children—placing them at an early age in other homes where they were treated partly as foster children and partly as apprentices or farm-hands. One of the motivations underlying the maintenance of this custom seems to have been the parents' desire to avoid the formation of strong emotional bonds with their offspring—bonds that might temper the strictness of the children's discipline or interfere with their own piety. *See* E. MORGAN, THE PURITAN FAMILY 32-38 (1956); Demos, *Notes on Life in Plymouth Colony*, WILLIAM & MARY Q., 3d Ser., XXII 264 (1965), *reprinted in* COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 57, 75-78 (S. Katz ed. 1976); A. MACFARLANE, THE FAMILY LIFE OF RALPH JOSSELIN 205-10 (1970). By the eighteenth century, however, the practice seems to have died out and the "tradition" of which the Court speaks had been established.

[62] *See Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (justifying some legal restrictions on minors' freedom of choice, partly on the basis of the need to preserve and reinforce the parental role in their upbringing, recognition of which is "deeply rooted in our Nation's history and tradition"); *Meyer v. Nebraska*, 262 U.S. at 402. The technique of defining constitutionally protected interests through reference to traditional values has been adopted by the Court in dealing with many other "familial" rights. *See, e.g., Zablocki v. Redhail*, 434 U.S. at 383-86; *Moore v. City of East Cleveland*, 431 U.S. at 503-05 (plurality opinion). For descriptions and defenses of this general mode of constitutional interpretation, see *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1177-87 (1980). For a criticism of it, see J. ELY, DEMOCRACY AND DISTRUST 60-63 (1980).

to instill in their offspring the values and motivations necessary to develop them into "mature, socially responsible citizens." [63] We assume that this is a function the state cannot effectively perform; only parents (or some close substitute) are sufficiently sensitive to the myriad, constantly fluctuating needs and drives of children to be able to provide them the combination of support and guidance necessary to prepare them for later life.[64] Such preparation, in turn, is essential not only to enable each child to think and act independently when he comes of age,[65] but to preserve and promote our system of government [66] and our way of life.[67] On the other hand, vesting in parents primary responsibility for the upbringing of children ensures the preservation of diversity and pluralism in our culture. As the Supreme Court explained long ago:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teach-

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[63] *Bellotti v. Baird*, 443 U.S. at 638 (plurality opinion). *See also Wisconsin v. Yoder*, 406 U.S. at 233; *cf. Moore v. City of East Cleveland*, 431 U.S. at 503-04 (plurality opinion) (arguing that we rely on the family—nuclear or extended—to "inculcate and pass down many of our most cherished values, moral and cultural"); S. KATZ, WHEN PARENTS FAIL 1-2, 12-13 (1971).

[64] *Prince v. Massachusetts*, 321 U.S. at 166 (dicta); C. LASCH, HAVEN IN A HEARTLESS WORLD 3-4 (1977). Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 623-24 (1977).

[65] *See* J. LOCKE, TWO TREATISES OF GOVERNMENT: THE SECOND TREATISE ch. VI, at 321-36 (P. Laslett ed. 1960).

[66] *See* Heymann & Barzelay, *The Forest and the Trees*: Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765, 772-73 (1973).

[67] *See Smith v. Organization of Foster Families*, 431 U.S. at 844 (dicta).

> ers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).[68] The undesirability of cultural homogenization would lead us to oppose efforts by the state to assume a greater role in children's development, even if we were confident that the state were capable of doing so effectively and intelligently.[69] In short, our collective wish to preserve and promote the enlivening variety of our social and political life prompts us to be wary of any tampering with our highly decentralized, substantially unregulated, parent-dominated child-rearing system.[70]

The third consideration is our appreciation of the profound importance of the bond between a parent and a child to the emotional life of both.[71] Frequently each

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[68] *Cf. Moore v. City of East Cleveland*, 431 U.S. at 506 (plurality opinion) ("[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

[69] *See Bellotti v. Baird*, 443 U.S. at 638 (plurality opinion).

[70] *See* B. RUSSELL, MARRIAGE AND MORALS 217-18 (2d ed. 1957); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 893 (1975); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 905-09 (1977); Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623, 635-36 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 992 (1975); *The Constitution and the Family*, *supra* note 62, at 1186 n.171, 1215 & n.111, 1354 & n.23.

[71] *See Smith v. Organization of Foster Families*, 431 U.S. at 844 (dicta) (stressing the importance of the "emotional attachments" arising out of the "familial relationship");

party to the relationship depends heavily on his ties with the other for his sense of self-worth, for his very self-definition. To rephrase the point in the language of entitlements, a parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring.[72] A child's corresponding right to

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Stanley v. Illinois, 405 U.S. at 652 (recognizing the importance of the warmth of a familial bond); B. RUSSELL, *supra* note 70, at 183-88, 194-95, 202-03. *Cf. Moore v. City of East Cleveland,* 431 U.S. at 505 (plurality opinion); *id.* at 508 (Brennan, J., concurring) (both opinions emphasizing the strength of the emotional ties between members of an extended family).

[72] *See* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work,* 51 S. CAL. L. REV. 769, 806-07 (1978); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 626-29; *The Constitution and the Family, supra* note 62, at 1353.

We intend our observations about the importance of contact with his children to a parent's emotional equilibrium to be comments, not about human nature, but about life in the United States today. Identification of constitutional rights, unmentioned in the document itself, that are nevertheless deserving of "fundamental" status is possible only through contextual analysis; in other words, we must take as given the general features of our society and polity and seek to identify the freedoms and relationships that, in the present environment, are crucial to self-definition and fulfillment. *Cf. Duncan v. Louisiana,* 391 U.S. 145, 149 & n.14 (1968) (When determining whether the Fourteenth Amendment obliges states to abide by one of the restrictions on criminal procedure embodied in the Bill of Rights, the pertinent question is not whether the limitation at issue is "necessarily fundamental to fairness in every criminal system that might be imagined but [whether it] is fundamental in the context of the criminal processes maintained by the American States."). Thus, for present purposes, we pay no heed to the

protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsive, reliable adult.[73]

To determine the strength of the constitutional interests asserted in the instant case, we must assess the relevance of the foregoing considerations to the plaintiffs' relationship as it existed prior to the defendants' alleged interference with it. We begin by asking what features distinguish the relationship between William and his offspring from the paradigmatic parent-child bond in a nuclear family. The answer turns upon a subtle distinction. It is well established that the strength and scope of constitutionally protected familial rights are not determined by the contours of state (or federal) law; what is important is the nature of the bond in question, not the way in which it has been categorized by a legislature or court. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (dicta); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).[74] It is equally well established,

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argument that our political and economic order induces us to place undue weight on intra-familial relations and that, in a better organized society, public life would absorb some (even most) of the energy presently invested in children and the home. *See, e.g.*, J. ROUSSEAU, THE SOCIAL CONTRACT bk. III, ch. 15, at 93 (G.D.H. Cole trans. 1950); M. WALZER, RADICAL PRINCIPLES 39-40 (1980).

[73] *See Duchesne v. Sugarman*, 566 F.2d at 825; J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 9-64 (1973); Garvey, *supra* note 72, at 815-17; Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645, 649-50 (1977); *The Constitution and the Family*, *supra* note 62, at 1353-54.

[74] *See also The Constitution and the Family*, *supra* note 62, at 1277-78, for a sound argument as to why "liberty interests" of this sort should not be defined by positive law. The difference between the treatment of familial rights and other liberty interests that have been held to be more dependent upon positive law, *see, e.g., Meachum v. Fano*, 427 U.S. 215,

on the other hand, that the state possesses substantial—and virtually exclusive—regulatory authority in the field of domestic relations. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Thus, there is no question that the Pennsylvania court in the instant case had authority to vest in Catherine custody over the children and to award William no more (and no less) than visitation rights.[75] What this means is that, for the purpose of weighing the plaintiffs' constitutional interests, we should eschew inferences drawn from the manner in which the state *describes* their rights or deals with them in other contexts,[76] but we must consider carefully the manner in which state law defines and limits William's access to and responsibility for the children.

A nuanced analysis of the sort just indicated would require detailed knowledge of domestic relations law in Pennsylvania—specifically of the practical concomitants of the terms "custody" and "visitation rights." We lack such knowledge and the parties have made little effort to educate us. For reasons that will become apparent, however, we believe that our inquiry may proceed upon two crude assumptions:[77] (1) The non-custodial parent in a

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226-28 (1976) (convicted prisoner's interest in avoiding adverse changes in his conditions of confinement); *Paul v. Davis*, 424 U.S. 693, 710-12 (1976) (reputation), may be explained by the "fundamental" (and arguably pre-social) character of the former.

[75] As indicated above, we are assuming for the purpose of this appeal that the state court indeed did so. *See* note 22 *supra*.

[76] Thus, for example, the fact that the state permitted the termination of "visitation rights" upon a lesser showing of neglect or unfitness than it required for the termination of "custody" would be irrelevant to our inquiry.

[77] If, on remand, these assumptions are shown to be inaccurate, the District Court may be compelled to reconsider some of our conclusions.

legally reorganized family generally spends considerably less time with his children than the custodial parent. (2) The custodial parent legally has the principal, if not exclusive, authority to make decisions regarding the child's education, religious training, and discipline[78] and, in practice, is usually the dominant force in the child's upbringing, but the non-custodial parent (assuming he exercises his visitation rights) in most instances retains some influence over the child's intellectual and moral development. On the basis of these rough generalizations, how should the reciprocal constitutional interests of a non-custodial parent and his children in one another's companionship be measured?

The first of the three factors discussed above—the existence of a tradition of respect for the institution in question—provides us little guidance. It seems undeniable that recognition of the sanctity of the bond between a child and his non-custodial parent is far less firmly embedded in our cultural heritage than respect for the autonomy of the relations between a child and parent in a nuclear family. But that discrepancy is readily explainable on the basis of the relative rarity, in United States society in the past, of regularly exercised "visitation rights." That situation is rapidly changing, however; the hegemony of the nuclear family is steadily being undermined. It has been predicted that the proportion of marriages fated to end in divorce will soon reach forty percent.[79] In light of the fact that a divorced parent who

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[78] *See In re Wesley J. K.*, 445 A.2d 1243, 1248 (Pa. Super. Ct. 1982) ("Legal custody" is defined by Pennsylvania statute as "[t]he legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions.").

[79] U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, No. 84, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT 1 (1979). In 1978 there were 2.2 million marriages and 1.1 million divorces. *Id.*

is not granted custody is routinely awarded visitation rights,[80] the result will be a large and growing number of children whose time and affection are divided between a custodial and a non-custodial parent.[81] In short, the institution of the "broken" family is becoming ever more socially important. To rely on the absence of a strong tradition of respect for one of the constituent relationships of that institution in determining its constitutional status seems senseless. Recognition of the need to adjust the meaning of the Constitution to conform to changes in social life [82] requires, in this instance, that we eschew reliance on history.

Reference to the second of the three factors is more productive of insight. Neither of the two complementary social functions fulfilled by traditional parent-child relations would appear to be specially dependent upon noninterference with the bond between a child and his noncustodial parent. Socialization of the children in such situations presumably can be adequately performed by the custodial parent (with or without the aid of a new spouse). And the values transmitted by a custodial parent are likely to be as distinctive as those transmitted by a non-custodial parent; vesting exclusive responsibility in the former for the child's upbringing, consequently, would not affect the overall diversity of the society. These points should not be overstated. To the extent that a child remains emotionally dependent upon a non-custodial parent, cutting off his access to that parent will be painful and disorienting and will in some measure reduce his ability to absorb any system of values.[83] But, on balance, it would appear that, insofar as our willingness to use the

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[80] *See* 2 W. NELSON, DIVORCE AND ANNULMENT 275 (1961).

[81] *See* BUREAU OF THE CENSUS, *supra* note 79, at 3, 11; Glick, *Children of Divorced Parents in Demographic Perspective*, J. SOC. ISSUES, Fall 1979, at 170, 171-72.

[82] *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

[83] *See* note 86 *infra* and accompanying text.

Constitution to shield parental and filial bonds from state interference derives from our recognition of the social needs served by those relations, we would be warranted in according diminished protection to the relation between a child and his non-custodial parent.

The force of the third consideration in the present context is somewhat harder to assess. The emotional importance of the bond between some parents and their children diminishes following the disintegration of the original family unit and the parent's loss of custody.[84] For others, however, the relationship remains important—even intensifies in response to the disruption or termination of other attachments.[85] Moreover, there is considerable evidence that the emotional stability of children of divorced parents is often tied to the quality of their continuing relationships with their non-custodial parent.[86] On this point, in short, it appears impossible to say with any confidence that the concerns that underlie our willingness to accord "fundamental" status to parent-child bonds are any less telling when the relationship in question consists of mere "visitation."

Our analysis thus far appears inconclusive. One of the two relevant factors suggests that the plaintiffs are entitled to only diminished constitutional protection; the other would place them on a par with parents and children in traditional settings. To choose between those options, we must examine more closely both the particulari-

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[84] *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 122-46, 235-57 (1980); R. WEISS, MARITAL SEPARATION 187-98 (1975).

[85] *See* J. WALLERSTEIN & J. KELLY, *supra* note 84, at 122-46, 235-39, 257-63; R. WEISS, *supra* note 84, at 187-98.

[86] *See* J. WALLERSTEIN & J. KELLY, *supra* note 84, at 218-19; Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, J. SOC. ISSUES, Fall 1979, at 79, 92-94.

ties of the case before us and the practical implications of attempting to differentiate it from a nuclear family.

We observe, to begin with, that *the alleged "infringement" in this case is no mere disruption or curtailment of the parent-child relation but its permanent termination.* Under these circumstances, the "emotional-attachments" consideration seems especially relevant and *equally* relevant to situations involving custodial and non-custodial parents. Arguably, state regulation of, for example, a child's education or religious upbringing threatens only moderately the emotional ties between the child and his parents—and is less likely significantly to affect the relations between the child and a non-custodial parent than the relations between the child and a custodial parent. Severance of the filial bond, on the other hand, obviously cuts deeply into the emotional interests of both parent and child—and may well be as painful and disorienting to a non-custodial parent as to one with whom the child enjoyed more frequent contact.

The foregoing generalization will not always hold. But to determine the severity of the emotional damage likely to be caused by any *particular* severance would be extremely difficult. The strength and psychic significance of a specific familial relation would be very hard to assess. Certainly no one objective index (such as frequency of visitation or degree of financial support) would be reliable. Moreover, the thorough inquiry necessary to make even a competent judgment of this sort would be time-consuming, degrading to the parties, and itself highly disruptive of the relationship in question.[87]

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[87] Our reluctance to mandate such an inquiry into the dynamics of a particular parent-child relationship is analogous to the distaste with which we contemplate the prospect of an inevitably disruptive inquiry into the workings of a religious institution. *See, e.g., Roemer v. Board of Pub. Works,* 426 U.S. 736, 748-51, 761-65 (1976) (plurality opinion) (dicta); *Lemon v. Kurtzman,* 403 U.S. 602, 619-22 (1971).

In light of these considerations, we conclude that the constitutional interests asserted by the plaintiffs are, in critical respects, roughly comparable to the interests of a parent and child in a viable nuclear family. We stress, however, that our analysis extends only to the question of the constitutional status of the right of a non-custodial parent and his or her children not to be totally and permanently prevented from ever seeing one another. In other words, we are considering here a narrow factual situation in which the government has acted to sever completely all ties between a non-custodial parent and his children without their participation or consent. In addressing this specific situation, we do not mean to suggest that a parent (or child) has a "fundamental right" to maintain visitation privileges in any particular way.

It is undisputed that the plaintiffs' protected interests have been invaded. We have established that the defendants are constitutionally responsible for that invasion. *See* Part II. *supra*. We now turn to the question whether, on the facts as alleged in the complaint, the defendants can justify their actions and the effects thereof.

IV. Governmental Ends and Means

Rights of the sort asserted by the plaintiffs are not absolute; when incompatible with sufficiently potent public interests, they must give way. But such situations arise infrequently. Severance of the relationship between a parent and his child will survive constitutional scrutiny only if four requirements are met: (a) the asserted governmental interest must be compelling; (b) there must be a particularized showing that the state interest in question would be promoted by terminating the relationship; (c) it must be impossible to achieve the goal in question through any means less restrictive of the rights of parent and child; and (d) the affected parties must be accorded

the procedural protections mandated by the Due Process Clauses.

These requirements, and the degree to which the defendants in the instant case have complied with each, are considered in order below. Our conclusion is that the plaintiffs have stated a cause of action in at least three of the four dimensions. We offer a relatively detailed analysis to explain our conclusion in the hope of preventing similar debacles in the future. Cases such as this can be avoided only through the promulgation of executive or congressional guidelines governing the administration of the Witness Protection Program that ensure the identification and accommodation of interests like those of the plaintiffs. The formulation of such guidelines may be difficult; the following discussion is intended to facilitate their development.

A.

The first and most important implication of our finding that the plaintiffs' stake in one another's companionship must be deemed a "fundamental liberty interest" is that the government must have a very good reason for abrogating their rights. Whatever may be the strength of the state interest necessary to justify a minor or moderate interference with their relationship,[88] it is clear

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[88] Individual Supreme Court Justices have openly advocated a "sliding-scale" approach when analyzing infringements of fundamental interests like those asserted here; the greater the impairment, the more substantial the state interest promoted by the action must be to justify it. *See Zablocki v. Redhail,* 434 U.S. 374, 396 (1978) (Stewart, J., concurring in the judgment); *Williams v. Illinois,* 399 U.S. 235, 260, 262-63 (1970) (Harlan, J., concurring in the result); *Shapiro v. Thompson,* 394 U.S. 618, 663 (1969) (Harlan, J., dissenting). Some such doctrine might be inferred from the case law. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 988-90 (1975). In the present context, we need not decide whether or how to adopt the approach.

that *permanent termination* of their bond can be justified only by the promotion of a "compelling" objective.[89]

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[89] For the general principle that abrogation of a fundamental right can be justified only by a "compelling state interest," see, *e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973). For application of that principle to termination of parent-child relationships, see *Alsager v. District Court*, 545 F.2d 1137, 1137 (8th Cir. 1976) (per curiam) (adopting the relevant portions of the district court's decision, 406 F. Supp. 10, 21-22 (S.D. Iowa 1975)); *Roe v. Conn*, 417 F. Supp. 769, 777 (M.D. Ala. 1976); *The Constitution and the Family*, *supra* note 62, at 1235-38.

The same result might be reached by a more circuitous route: the "fundamental rights" branch of equal protection doctrine. We observe that the Witness Protection Program, as implemented, results in the denial of access by a particular group (namely, the non-relocated parents of children taken into the program and the children themselves) to a fundamental right (the right to the companionship of one's child or parent). Accordingly, the Program should be subjected to "strict scrutiny" under the Equal Protection Clause. In other words, the government must show that discrimination between members of the affected group and other parents and children is necessary to promote a "compelling governmental interest." *See Dunn v. Blumstein*, 405 U.S. 330, 334-43 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-28 (1969). If there is any difference in practice between this approach and the simpler one described in the text, it is that equal protection analysis is more rigid, less sensitive to variations in the degree to which access to or exercise of the right at stake has been impaired. *See The Constitution and the Family*, *supra* note 62, at 1193-97. *But see* Note, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.—C.L. L. REV. 529, 561-65 (1979) (suggesting that the two approaches, as applied, are functionally indistinguishable). Thus, though equal protection theory has, on occasion, been invoked in dealing with familial rights, *see Zablocki v. Redhail*, 434 U.S. at 383-91, and might be adapted to fit the instant case, we see no need to rely upon it. *Cf. Zablocki v. Redhail*, 434 U.S. at 395-96 (Stewart, J., concurring in the judgment); *Williams v. Illinois*, 399 U.S. at

The defendants might point to two objectives in an effort to provide a compelling justification for their conduct in this case:[90] promotion of the "best interests" of the children themselves or advancement of the public interest in the suppression of organized crime.

The first argument merits only brief attention. For two reasons, invasion of the plaintiffs' protected interests cannot be justified on the basis of the government's *parens patriae* interest in protecting the welfare of the children.[91] First, the Supreme Court has made plain, albeit in dictum, that a government could not break up a "natural family" solely on the basis of a determination that the children's "best interest" would be served thereby, absent a showing that the parents were "unfit" to care for their offspring. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in the judgment)). The relations between William and his offspring are entitled to no less protection. *See* Part III. *supra*. Second, the only plausible basis for a justification related to the "best interests" of the children would be the possibility that their lives would be

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259-60 (Harlan, J., concurring in the result) (both arguing that "substantive due process" analysis, despite its negative connotations, is more honest and discriminating).

[90] In point of fact, the defendants fail to offer any justification, relying for their defense to the plaintiffs' constitutional claims solely on the theory that they are not responsible for the severance of the relationship between William and the children. Appellees' Brief at 14-17. Having rejected the one argument advanced by the defendants, *see* Part II. *supra*, we might reverse the judgment of the District Court without further ado. Our desire to help chart this hitherto little explored legal territory, however, prompts us to proceed.

[91] For a good discussion of this source of state authority to intervene in familial relations, see *The Constitution and the Family*, *supra* note 62, at 1221-42.

endangered if William were allowed to see them.[92] That argument, however, is seriously weakened by the fact that the government itself must bear at least some responsibility for creating any such danger. By inducing Allen to come forward with evidence against leaders of organized crime, it has created a situation in which the children are potential targets of retaliation. Invasion of the plaintiffs' rights should not be legitimated by the need to solve a problem the defendants themselves have generated.

The second argument available to the defendants is much more substantial. Organized crime, they might point out, is a serious problem in the United States today. Moreover, its very "organization," and the code of secrecy by which its participants are bound, hamper the efforts of law enforcement agencies to obtain the evidence necessary to stop or curtail it. Evidence against organization leaders is particularly hard to come by. The police therefore must rely heavily on testimony provided by informants—people formerly or currently involved in organized criminal activity. Securing the aid of such persons is not easy; they are aware that by providing evidence against their former partners or employers, they place their own lives and the lives of their families in jeopardy. If the government were unable to guarantee their safety, they would rarely come forward. In sum, suppression of organized crime requires that the government be empowered, in its discretion, to relocate informants and members of their households and to maintain the secrecy of their new identities. And that, in turn, requires that the government be free, when it deems

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[92] For the purpose of pursuing this portion of the analysis, we assume that such a danger would inevitably be associated with accommodation of William's rights. The significance of the availability of a procedure by which the government could achieve its objectives and still afford William some access to the children without placing them at risk is taken up in Part IV.C. *infra.*

appropriate, to terminate contacts between witnesses or members of their families and people who figured in their past lives.

The foregoing justification clearly has some force. Whether it would be sufficient to warrant severance of the bond between a child and his natural parent we find it impossible, at this point, to say. Our inability to resolve this issue derives partly from the paltriness of the pertinent precedent. The lack of guidance afforded us by the case law results, in turn, principally from the frequency with which we and other courts have employed a convenient device for evading questions like that before us. Faced with a conflict between an important individual right and a powerful state interest that allegedly warrants infringement of the right, courts have been prone to hypothesize that the state's objective would prevail if the challenged statute directly and effectively promoted it, and then go on to examine the closeness of the "fit" between the statute and the asserted objective—in general and in the case at bar. The usual conclusion is that the enactment, in fact, would do little to advance the asserted end. Its principal justification thus undercut, the enactment collapses when subjected to constitutional attack. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 690-91, 694-96 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977) (plurality opinion).[93]

In the following sections, we follow a similar analytical path.[94] But, though that analysis suffices to decide the case before us, it leaves unresolved one important question likely to be presented in similar cases in the future (and thus that must be addressed by the draftsmen of

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[93] This general mode of analysis is discussed and criticized in Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 207-13 (1976); *The Constitution and the Family, supra* note 62, at 1211 n.95.

[94] *See* Parts IV.B. and IV.C. *infra.*

guidelines for dealing with situations like this)—if, in a particular instance, government officials demonstrate that the testimony of an informant is *essential* to the prosecution of an important leader of organized crime and that the interests of a non-custodial parent and members of the informant's household cannot be accommodated without risking human life, may the government go ahead, accept the informant and his family into the program, and subsequently deny the parent access to the children?

Courts' traditional reluctance to confront questions of this order means that we have very little to go on. We know, of course, that a state's legitimate interests in protecting children's welfare and in promoting the public health, safety, welfare and morals are sufficient to justify minor restrictions on parents' control over the upbringing of their offspring. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (dicta); *Prince v. Massachusetts*, 321 U.S. 158, 166-70 (1944). And, if it can show that a parent is "neglectful" or otherwise unfit to care for a child, a state may sever the bond between the two. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (dicta).[95] But there are few other features on this doctrinal map. Without any markings to assist us in getting our bearings, our answer to the aforementioned question might turn solely upon whether we felt that the suppression of organized crime was sufficiently important to be fairly described as "compelling."

Any inclination we might have to speculate on that issue is dissipated by the paucity of relevant evidence in the record before us and the inconclusiveness of the data

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[95] The guidance we might gain from this rule is limited by the fact that a finding of neglect or unfitness not only strengthens the state's *parens patriae* interest in the child's welfare, but strongly suggests that the bond between the parent and child has already atrophied. The rule thus tells us little regarding what is necessary to warrant termination of a healthy, ongoing relationship.

available from other sources. Observers and scholars continue to disagree not only over the likelihood that an informant will be "disciplined" by those he implicates[96] (and thus the need for a Witness Protection Program), but also over the nature and scope of the activities conducted by organized crime[97] and the seriousness of the threat that such activities pose to law-abiding citizens and to the integrity of our economic and political systems.[98] Given the range of respectable opinions on these

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[96] *Compare* J. ALBINI, THE AMERICAN MAFIA 267-69 (1971) (If a participant breaks the code of silence and reveals facts that "might be legally devastating to important syndicate participants, he probably will be killed. The latter is almost always the case when an informant gives evidence resulting in the indictment or conviction of an important syndicate functionary. We say almost always because in some cases, social conditions [such as fear of a police crack-down prompted by adverse publicity] may warrant against it.") *with* F. IANNI & E. REUSS-IANNI, A FAMILY BUSINESS 146-49 (1972) (study of one Italian-American crime family yielded no evidence of the use of "coercive sanctions" for violations of "rules of conduct" (including the "rule of secrecy"), though "it would be naïve to suggest that such sanctions do not exist") *and* R. CLARK, CRIME IN AMERICA 73 (1970) ("discipline" is not as strict as it once was).

[97] *Compare* PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 187-96 (1967) (describing a vast and expanding network of illegal operations) *with* R. CLARK, *supra* note 96, at 73 ("The wealth and income of organized crime are exaggerated beyond reason.").

[98] For a spectrum of views, see PRESIDENT'S COMM., *supra* note 97, at 187-88 ("The millions of dollars [organized crime] can spend on corrupting public officials may give it power to maim or murder people inside or outside the organization with impunity, to extort money from businessmen, to conduct businesses in such fields as liquor, meat, or drugs without regard to administrative regulations, to avoid payment of income taxes, or to secure public works contracts without competitive bidding. The purpose of organized crime is not competition with visible, legal government but nullification of it. When organized crime places an official in public

crucial issues, we must decline to say more than that the assessment of the relative strength of the government's interest and the parent's and children's rights will be a difficult task for the body that ultimately must undertake it.

B.

Assuming, *arguendo*, that the government's interest in the suppression of organized crime is sufficiently potent to justify invasion of constitutionally protected familial rights, the government may not rely on an irrebuttable presumption that its interest would be promoted in a given case, without affording the affected parties an opportunity to prove otherwise. *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972).[99] In part, this principle is an outgrowth of the

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office, it nullifies the political process. When it bribes a police official, it nullifies law enforcement."); J. ALBINI, *supra* note 96, at 55-78 (Organized crime serves Americans' apparently ineradicable need for "illicit" goods and services, but does so partly through infiltration and corruption of the political system.); *id.* at 269-83 ("[V]iolence or the threat of it" is used extensively to eliminate competition in illegal activities but seemingly not to enter legitimate businesses; extension and collection "in kind" of illegal, usurious loans is sometimes used to take over, in whole or in part, legitimate businesses.); F. IANNI & E. REUSS-IANNI, *supra* note 96, at 89-106 (study of one crime family revealed extensive and growing involvement in "legitimate" as well as "illegitimate" businesses and substantial indirect transfers of funds from the latter to the former but little if any of the (once common) use of extortion and other illegal methods to expand "legitimate" operations and drive out competition); D. SMITH, THE MAFIA MYSTIQUE 331-35 (1975) (The threatening aspect of organized crime derives largely from our fear that it will undermine our belief in and commitment to ideals such as democracy and "equal justice"; such a perception is misleading insofar as it focuses attention and animus on one of the products, not the cause, of forces and practices that are undermining our values.).

[99] *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-48 (1974); *In re Linehan*, 280 N.W.2d 29, 32-33 (Minn. 1979); *State v. Robert H.*, 118 N.H. 713, 393 A.2d 1387, 1391

doctrine of procedural due process.[100] In part, it is a corollary of the doctrine of substantive due process:[101] avoidance of any unnecessary infringement of fundamental rights requires that the government make a *particularized* showing of advantage in every case in which it contemplates depriving someone of constitutionally protected interests.[102]

In this case, there *may* have been such a particularized determination; the governing Justice Department Order instructs the Assistant Attorney General in charge of the concerned division to admit a witness and his household into the program only upon a finding that (among other things) admission "would be advantageous to the Federal interest."[103] But, putting aside for the moment the high risk of error in such an *ex parte* judgment made by an interested party,[104] there is no indication in the record that the Assistant Attorney General was ever aware that induction of Allen, Catherine and the children would have the effect of terminating the relationship between the children and their natural father. The Constitution requires that there be more than a determination that the "Federal interest" would be marginally advanced by taking action in a particular case; there must be a showing

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(1978); Disanto & Podolski, *The Right to Privacy and Trilateral Balancing—Implications for the Family,* 13 FAM. L.Q. 183, 209-10 (1979).

[100] *See* Part IV.D. *infra.*

[101] *See* Part IV.A. *supra.*

[102] In recent years, the Supreme Court has sharply curtailed the scope of the "irrebuttable presumption" doctrine. *See Weinberger v. Salfi,* 422 U.S. 749, 770-85 (1975). The Court has made clear, however, that the doctrine remains viable when fundamental rights are at stake. *See Turner v. Department of Employment Sec.,* 423 U.S. 44, 46 (1975) (per curiam); *Weinberger v. Salfi,* 422 U.S. at 771-72.

[103] *See* text at note 13 *supra.*

[104] That risk is considered in Part IV.D. *infra.*

that the governmental interest would be promoted in ways sufficiently substantial to warrant overriding basic human liberties. That requirement has not been met in this case.

C.

To justify restriction of constitutionally protected activity, the government must do more than show that such curtailment would promote, in a particular case, compelling governmental interests.

> [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). This principle has been repeatedly reaffirmed when constitutionally protected familial rights have been threatened. *See Carey v. Population Services International*, 431 U.S. at 686; *Doe v. Bolton*, 410 U.S. 179, 194-95 (1973); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

In this case, the defendants concede that they were and are capable of arranging secret meetings between William and the children.[105] They acknowledge that such contacts would not jeopardize the safety of the children, Catherine or Allen. And, whatever may be the legal or equitable constraints on their ability, at this juncture, to demand that Catherine permit the children to see their father, it is beyond dispute that they had the authority, at the time they accepted Allen and his family into the program, to insist that Catherine agree to such an arrangement.[106] There is no suggestion in the record that

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[105] *See* text at note 28 *supra*.

[106] *See* text at notes 29-32 *supra*.

the defendants would have been unable to induce Allen to testify had they demanded that the rights of the plaintiffs be accommodated in the aforementioned manner. In short, the defendants apparently had ready access to a "less drastic means" for achieving their goals. Their decision not to avail themselves of that option was inconsistent with their duty under the Constitution.

D.

It is beyond dispute that

> state intervention to terminate the relationship between [a parent] and [a] child must be accomplished by procedures meeting the requisites of the Due Process Clause.

Santosky v. Kramer, 455 U.S. 745, 753 (1982) (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting)).[107] Conformity with the principles of procedural due process, in this context, serves three independent functions. First, by exposing to adversarial testing the government's asserted rationale for its action, it reduces the likelihood of error—*i.e.*, the risk that the government will act on the basis of what, in reality, is an insufficient justification.[108] Second, it permits the adversely affected parties to inform the government of ways in which the government's objectives might be achieved through means less restrictive of their rights. Third, it accords the affected parties some measure of dignity; it enables them to participate in and un-

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[107] *See also Lassiter v. Department of Social Servs.*, 452 U.S. at 27-32; *id.* at 59-60 (Stevens, J., dissenting); *Rivera v. Marcus*, 696 F.2d 1016, 1028-29 (2d Cir. 1982) (removal of foster children from the custody of their half-sister can be accomplished only in accordance with procedural due process).

[108] For explication of this error-avoidance function, see *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

derstand the process whereby their interests are assessed and, if necessary, restricted.[109]

It is clear that "the requisites of the Due Process Clause" were not satisfied in the instant case. The defendants have never provided William with any kind of notice or opportunity to be heard. The Constitution certainly requires that much.[110]

How much more the Constitution requires in situations like that before us is far from clear. Set forth below are some of the major considerations that must be taken into account when designing a system for dealing with cases of this sort. Formulation of the details we must leave to a body with greater knowledge than we possess of the ways in which the Witness Protection Program does or might operate.

We begin with the principle that,

> [*b*]*efore* a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis added). Holding the hearing before execution of the decision is particularly important where, as here, the deprivation of the protected interest might be irrev-

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[109] *See* Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-03 (1978).

[110] *See Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (a divorced father may not be deprived of his visitation rights (through adoption of the child by the mother's new spouse) without, at a minimum, "notice and opportunity for hearing appropriate to the nature of the case") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

ocable or might cause irreparable harm and where the decision will not turn on judgments that can sensibly be made on the basis of written submissions.[111]

At oral argument, the defendants' counsel argued that the need for secrecy and speed in the admission of witnesses might make a pre-entrance hearing of any sort impracticable. In some cases that may well be true, but it appears that in the majority of cases the Attorney General's office now informs the Marshals Service of a decision to admit an informant at least three workdays prior to the scheduled pick-up.[112] It seems to us not inconceivable that, sometime during those three days, a secret meeting might be held to hear and evaluate the government's assertions of need and the objections and claims of the non-relocated parent.

In those instances in which holding such a hearing would truly be impossible, the requirements of the Due Process Clause would be merely suspended, not elimi-

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[111] The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 340-45 (1976), justified postponing an evidentiary hearing until after the termination of social security disability payments largely on the grounds that (i) the decision was easily reversible, (ii) retroactive payment of any erroneously withheld benefits would avoid any irreparable harm, and (iii) the decision in question depended almost entirely on a medical judgment that could be made competently (at least temporarily) on the basis of written submissions by the recipient's doctor. In this situation, by contrast, (i) it is likely to be unfeasible for the government to revoke a decision to admit a witness and his family into the program, (ii) without advance planning it may be difficult or impossible after the fact to accommodate the rights of the non-relocated parent (or periodic secret meetings may be an inadequate substitute for the relationship he formerly enjoyed with his children), and (iii) written submissions could not adequately inform a decisionmaker.

[112] *See* Order OBD 2110.2, *supra* note 11, at ¶¶ 7b-7c, *reprinted in* 1978 *Hearings* at 136; 1980 *Hearings* at 243-44 (testimony of Howard Safir).

nated;[113] as soon as practicable after the admission of the informant, a hearing would have to be held, at least to work out some accommodation of the rights of the children and the parent left behind.[114]

Envisioning what a pre-admission (or post-admission) hearing might look like is no easy task. The affected parties would be entitled to no more (and no less) than a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The situation before us is so idiosyncratic that it is difficult to predict the kind of "process" that both would be workable and would fulfill the three functions described above. We are unable to do more than offer the following suggestions:

(1) The irrevocability of decisions to admit witnesses and their households, combined with the virtual impossibility of obtaining meaningful judicial review of such judgments, strongly suggests that those determinations should be made in accordance with a standard set of basic procedures, not processes developed and modified on a case-by-case basis. *Compare Santosky v. Kramer*, 455 U.S. at 757 & n.9 (procedural "rules of general application" necessary when appellate review would be insuffi-

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[113] *See Boddie v. Connecticut*, 401 U.S. at 379; *Duchesne v. Sugarman*, 566 F.2d 817, 826, 828 (2d Cir. 1977).

[114] In such circumstances, it would also be imperative that the witness and the adult members of his household be informed, *prior* to their admission, that such a hearing would be held soon after their induction. Moreover, they would be admitted only on the condition that they agree to abide by whatever arrangement is worked out at that session for accommodating the interests of the children's other parent. An additional provision in the standard Memorandum of Understanding might suffice for these purposes.

cient to ensure "fundamental fairness"), *with Lassiter v. Department of Social Services*, 452 U.S. at 31-32 (procedures determined on a case-by-case basis suffice when appellate review would be an adequate check).

(2) This is not to say that those procedures should be highly formal; quite the contrary. The need for confidentiality and some measure of speed, combined with the value of encouraging the parties to speak freely with one another in working out a mutually satisfactory solution to their common problem, argues in favor of an informal setting. Some kind of neutral arbiter might have to be present, but the emphasis should be on negotiation and accommodation, not confrontation.

(3) In deciding more specific questions relating to the form of the proceeding—*e.g.*, whether the parties should have a right to be represented by counsel, should be able to present or cross-examine witnesses, etc.—reference should be made to the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for the selection of a procedure that optimally balances the reduction of the risk of error and the burdensomeness of additional safeguards.[115] Reliance on those considerations should be tempered, however, by sensitivity to (a) the need to foster

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[115] The Supreme Court there held:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. *See also Santosky v. Kramer*, 455 U.S. at 754; *Lassiter v. Department of Social Servs.*, 452 U.S. at 27-31; *Smith v. Organization of Foster Families*, 431 U.S. 816, 848-49 (1977).

negotiation and compromise and (b) the importance of involving the non-relocated parent in the decisionmaking process.[116]

Conclusion

For the foregoing reasons, the District Court's decision that the plaintiffs failed to state a claim for which relief could be granted is reversed. The case is remanded for further proceedings consistent with this opinion.

Because of the posture in which the suit has appeared before us, we express no opinion on the truth of the allegations in the complaint. We also decline to reach a host of other issues that further prosecution of the case may raise: the merits of the defendants' various jurisdictional defenses; whether some or all of the defendants are immune from liability; and the form or measure of relief that might be appropriate. These are all matters that might be addressed on remand.

As to the propriety and utility of pressing onward in litigation, we venture our opinion that ultimate resolution of this controversy by a court may not be the ideal solution for any of the parties. As the disputants conceded at the outset, this case involves a conflict between several powerful, legitimate interests. Guided by the foregoing clarification of their respective claims, the parties are likely to be better able than a judge to work out an arrangement for reconciling—or at least compromising between—their various needs and desires.

With regard to the general problem presented by this case, we reiterate our plea that either Congress or the administrators of the Witness Protection Program develop a set of guidelines that would facilitate the detection and accommodation of interests like those of the plaintiffs.

Reversed and remanded.

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[116] *See* text at note 109 *supra.*

MICHAEL RUFFALO, JR., BY HIS MOTHER AND NEXT FRIEND, DONNA RUFFALO; AND DONNA RUFFALO, APPELLANTS,

v.

BENJAMIN CIVILETTI; WILLIAM E. HALL; EMMITT FAIRFAX; MICHAEL RUFFALO, SR.; THE UNITED STATES DEPARTMENT OF JUSTICE; THE UNITED STATES MARSHALS SERVICE; AND THE UNITED STATES OF AMERICA, APPELLEES.

Nos. 82-1779, 82-1893

United States Court of Appeals, Eighth Circuit

Submitted Jan. 12, 1983

Decided March 17, 1983

Rehearing and Rehearing En Banc

Denied June 8, 1983

Mother sought damages and injunctive relief against ex-husband and numerous federal officials based on alleged wrongful inclusion of son in federal witness protection program. The United States District Court for the Western District of Missouri, Howard F. Sachs, J., 539 F.Supp. 949, denied partial summary judgments seeking return of son, and mother appealed. The Court of Appeals, Arnold, Circuit Judge, held that: (1) mother's relationship with son was part of the "liberty" protected by the due process clause of the Fifth Amendment; (2) requisite government action was present; (3) domestic-relations exception to federal jurisdiction was not applicable; and (4) although it was prudent not to grant any particular form of injunctive relief without further exploration of certain fact questions, some form of relief could be fashioned that would vindicate mother's rights without unreasonably endangering son and former husband.

Affirmed and remanded.

Opinion following remand, 565 F.Supp. 34.

1. United States ⚿125(18)

Sovereign immunity was no bar to injunctive relief sought against institutional federal defendants by mother, claiming denial of constitutional rights in failing to reveal identity and location of minor son, who along with the father had been given new identities and relocated under federal witness protection program, and damages could be also sought from the individual defendants, subject to defense of qualified, good-faith immunity. 18 U.S.C.A. § 3481; U.S.C.A. Const. Amend. 5.

2. Constitutional Law ⚿274(5)

For purposes of mother's action seeking return of minor son, who along with father had been given new locations and identities under federal witness protection program, the mother's relationship with the son, of whom she had been given custody on divorce but who was in "possession" of father informant, was part of the "liberty" interest protected by the due process clause of the Fifth Amendment. U.S.C.A. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

3. Parent and Child ⚿2(2)

Rights of parents to care, custody and management of their children are not absolute and compelling public necessity can justify their termination if proper procedures are followed.

4. Constitutional Law ⚿254(3)

There existed "government action" for purpose of mother's action against federal officials for return of minor son, who along with father had been relocated and given new identities under federal witness protection program, as government officials relocated the pair and assigned new social security numbers and new school records and paid father's lawyer to contest state court custody orders and defend mother's claim in instant suit and continued to conceal where-abouts of the pair and, also, father's conduct constituted "government action" for Fifth Amendment

purposes as he could not have taken and retained the child without government assistance. 18 U.S.C.A. § 3481; U.S.C.A. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

5. Courts ⚷508(3)

Ordinarily, a federal court will not grant an injunction to compel a parent to obey a state decree awarding custody of the children to the other parent.

6. Federal Courts ⚷8

Removal of Cases ⚷10

Domestic-relations exception to federal jurisdiction did not apply to mother's action against federal officials seeking return of minor son, who along with father had been relocated and given new identities under federal witness protection program, since if federal officials were made parties to state court proceedings, which placed both custody and control of child in mother, the state court might have jurisdiction to grant an injunction and if state court had jurisdiction the federal officials, who refused to disclose son's whereabouts, could remove the action to federal court and federal injunctive relief would merely confirm state court decree. 28 U.S.C.A. §§ 1331, 1442I(a)(1); U.S.C.A. Const. Amend. 5.

7. Injunction ⚷189

Although mother's relationship with her son, who along with ex-husband had been relocated and given new identities under federal witness protection program, was a constitutionally protected liberty interest, it was prudent for the district court not to grant a particular form of injunctive relief against federal officials, who refused to divulge the son's location and identity, without further exploration of certain fact questions, although some particular form of relief could be fashioned that would vindicate mother's rights without unreasonably endangering son and former husband. 18 U.S.C.A. § 3481

Robert G. Ulrich, U.S. Atty., Mark J. Zimmermann, Asst. U.S. Atty., Kansas City, Mo., for appellees.

George E. Kapke, Cochran, Kramer, Kapke & Willerth, Independence, Mo., for Michael Ruffalo, Sr.

George Kannar, Jack Novik, Marcia Robinson Lowry, American Civil Liberties Union, New York City, Sanford P. Krigel, Krigel & Krigel, Kansas City, Mo., for appellants.

Before BRIGHT, ARNOLD, and JOHN R. GIBSON, Circuit Judges.

ARNOLD, Circuit Judge.

Donna Ruffalo appeals from the denial of her motion for partial summary judgment, by which she sought the return of her child, who has been relocated by the federal government under the federal Witness Protection Program. The District Court [1] held that Donna's relationship with her child is constitutionally protected but denied her motion for summary judgment largely because it felt that genuine issues of fact remained to be tried with respect to the government's responsibility for the continued separation of mother and child. We agree with the District Court that the parent-child relationship, in the circumstances of this case, is part of the "liberty" protected by the Due Process Clause of the Fifth Amendment. We disagree with the grounds stated for the denial of the motion for summary judgment, but we nevertheless conclude, for other reasons shortly to be explained, that it was not error to refuse immediate injunctive relief commanding the return of the child. The orders denying summary judgment will therefore be affirmed. We hold, however, that Donna has made out a strong prima facie entitlement to some form of equitable relief, and we remand for further proceedings to determine what relief, if any, to grant.

I

Michael Ruffalo, Jr. (Mike), was born on September 7, 1969, to Donna and Michael Ruffalo, Sr. Donna obtained a divorce by default in the Circuit Court of Jackson County, Missouri, from Michael on March 20, 1972, and she was awarded custody of Mike.[2] Three years later, Donna and Michael entered into an "Informal Letter

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[1] The Hon. Howard F. Sachs, United States District Judge for the Western District of Missouri.

[2] Michael was ordered to pay child support and was awarded reasonable visitation rights.

Agreement Re Possession of Child," which provided that Donna would have "custody" of Mike, while Michael would have "possession." [3] The terms of this agreement were incorporated into a second custody order, which was entered on March 19, 1975. Thereafter, Mike lived with his father, and although the parties disagree about how much time Mike spent with his mother, she saw him at least occasionally, and she exercised some degree of parental control by enrolling him in school.

During this time, Michael was a secret informer for the FBI, which was investigating organized crime in Kansas City, Missouri. In late October and early November 1978 federal officials received information that Michael's life was in danger. Michael asked the FBI for protection, and on November 16, 1978, both Michael and the nine-year-old Mike were taken into the federal Witness Protection Program.[4] Donna has not seen or talked with her son, who is now thirteen years old, since. She learned of her son's relocation only after the fact.

At government expense, new identities were created for father and son. Federal officials moved them to a secret location and gave them new names, new social security numbers, and a temporary residence. In addition, they provided Mike with new school records so that he could be admitted to school without having to produce records from his former school which would reveal his true identity. At no time did the government provide Donna with notice or an opportunity to be heard in opposition to the separation.

At the time that Michael and Mike went into the Witness Protection Program, the federal authorities knew that Mike was living with his father and thought that Michael had legal custody. Shortly thereafter, however, the officials learned that custody had been awarded to Donna. Donna contacted federal officials in Kansas City, seeking information about her child, and requested that Mike be returned to her. The authorities told her that her son and ex-husband were under the Witness Protection Program and that their new identities and location would not be revealed to her because disclosure would endanger Michael. The officials offered to relay messages to Michael, and on at least two occasions the federal Marshals Service, which runs the Witness Protection Program, told Michael that Donna wanted to speak on the phone with her son, but Michael refused to allow this.

Donna tried to get relief from the state court which had awarded her custody of Mike. On January 15, 1979, the Marshals Service served Michael with an Order to Show Cause and Application for Contempt Citation from the Missouri state court. Michael refused to appear. After two more orders to show cause were served, the state court, on February 14, 1979, found Michael in civil contempt of the March 19, 1975, custody order. On March 20, 1979, the state court issued a warrant of commitment, ordering that Michael be committed to the Jackson County, Missouri, jail for ninety days or until he obeyed the court's custody order. Donna then moved to modify the custody decree, and on July 24, 1979, after Michael had received notice through the Marshals Service and failed to appear, the state court modified its March 19, 1975, order, awarded "the full care, control and custody of her son" to Donna, and cancelled all Michael's visitation rights or privileges. D.R. 27. Neither the contempt citation, the warrant, nor the 1979 custody order has ever been enforced, since Michael has refused to comply, and the government has refused to divulge his whereabouts or otherwise to help enforce the state-court orders. The government employed private counsel at government expense to represent Michael in the custody dispute.

On July 23, 1980, Donna, on behalf of herself and her son, commenced this action for injunctive relief and damages by filing a complaint in the United States District Court for the Western District of Missouri against Michael and the federal officials responsible for concealing him through the Witness Protection Program. She alleged

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[3] The agreement provided:

1. That Donna Ruffalo shall keep and maintain custody of the child Michael Ruffalo in accordance with the default decree heretofore granted.

2. It is further agreed that Michael J. Ruffalo shall keep and maintain possession of said minor child Michael Ruffalo, and that no change of said possession of this child shall be made without mutual agreement of the parties or by further order of the Court in this respect.

3. The father Michael J. Ruffalo shall continue to furnish the support for the child by provising [sic] the same in kind for the child.

4. The mother Donna Ruffalo shall be entitled to the possession of the child without further order of the Court, on Sunday or Saturday of each week; and they will alternate possession on important holidays . . . and other wise [sic] reasonable visitation right [sic] to Donna.

Designated Record (D.R.) 21.

[4] The federal Witness Protection Program was authorized by Title V of the Organized Crime Control Act of 1970, P.L. 91-452, §§ 501-504 (reprinted preceding 18 U.S.C. § 3481 (1976)). It is administered by the United States Marshals Service.

that the defendants had violated the Due Process Clause of the Fifth Amendment to the United States Constitution by unreasonably intruding upon Donna Ruffalo's right to family integrity and to a relationship with her son, by failing to provide Donna Ruffalo with a hearing before infringing upon her constitutionally protected liberty interests, and by interfering with and destroying Donna Ruffalo's right to enforce the order of the Circuit Court of Jackson County, Missouri.[5]

D.R. 15. Jurisdiction of this claim was alleged to be based on the existence of a federal quesiton.[6]

The District Court severed the injunctive aspect of the suit from the damages aspect. Donna then moved for partial summary judgment, seeking an injuction for the return of Mike. Before hearing the motion, the District Court ordered a stay of proceedings so that Michael could seek a custody hearing in state court. *Ruffalo* v. *Civiletti,* 522 F.Supp. 778 (W.D.Mo. 1981). This action was taken at Michael's own request. However, Michael then refused to appear personally in the state court and sought merely to have service of that court's previous orders quashed. When the state court ruled against Michael, the District Court once again took up Donna's motion for partial summary judgment, as well as the federal defendants' motion to dismiss or for summary judgment. *Ruffalo* v. *Civiletti,* 539 F.Supp. 949 (W.D.Mo. 1982).

[1] Although the District Court held that the complaint stated a claim for violation of Donna's constitutional rights,[7] it declined to grant her relief, reasoning that the domestic-relations exception to federal jurisdiction barred an injunction against Michael, and that summary judgment against the federal defendants was inappropriate because there was a question of fact as to whether Mike was in federal custody. The federal defendants' cross-motion to dismiss was denied.[8] Donna then filed a Motion for Partial Reconsideration of the April 30 order, this time seeking certain alternative forms of equitable relief against the federal defendants only. The District Court denied this motion on July 1, 1982, in an unreported order. Donna appeals from the denial of both her motions. We have jurisdiction because the orders appealed from are orders denying injunctions. 28 U.S.C. § 1292(a)(1).

[2] The District Court held, and we agree, that Donna's relationship with her son is part of the "liberty" protected by the Due Process Clause of the Fifth Amendment. The defendants rely on *Leonhard* v. *Mitchell,* 473 F.2d 709 (2d Cir.), *cert. denied,* 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1002 (1973). In *Leonhard* the state court had awarded custody of the children of a divorced couple to the mother and visitation rights to the father. The mother remarried, and when her new husband decided to testify for the government in a case concerning organized crime, the entire family was relocated and given new identities by federal officials. After obtaining a second state decree awarding custody to him, the father sued in federal court seeking a writ of mandamus to compel the government to divulge the whereabouts and new identities of his children. The Second Circuit held that summary judgment against the father was appropriate. The court said that there was no "clear constitutional right to custody or visitation rights," *id.* at 713, and that mandamus was inappropriate because the government official's [9] refusal to disclose to the father the whereabouts of the children was a rational exercise of his discretion, *id.* at 714. If *Leonhard* may be read to mean that a parent who has been awarded custody of his or her child has no constitutionally protected interest, we must re-

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[5] A like constitutional claim was made on behalf of Mike. In addition, the complaint alleged that the defendants had violated the Administrative Procedure Act, 5 U.S.C. § 706 (1976); that the federal defendants had committed various intentional torts upon the plaintiffs, hereby subjecting the United States to liability under the Tort Claims Act, 28U .S.C. §§ 2671-2680 (1976 & Supp. V 1981); that the defendants had violated the Freedom of Information and Privacy Acts, 5 U.S.C. §§ 552, 552a (1976 & Supp. V 1981); and that Michael had violated the plaintiffs' rights under Missouri law. D.R. 15-17.

[6] The parties later raised the issues of diversity and habeas corpus jurisdiction. In view of our decision, we need not address these issues.

[7] The court decided that sovereign immunity was no bar to the injunctive relief sought against the institutional federal defendants, and that damages could be sought from the individual defendants, subject to a defense of qualified, good-faith immunity. 539 F.Supp. at 952-53. We agree with these holdings.

[8] In addition, the court denied summary judgment against the plaintiffs on the Freedom of Information Act, the Administrative Procedure Act, and the Tort Claims Act claims, except that the claim for damages for false imprisonment under the latter act was dismissed.

[9] At the time the father brought the action, only one official knew the current whereabouts and identities of the children.

spectfully disagree.[10] Parents have a fundamental "liberty interest" in the care, custody, and management of their children. See, *e.g., Santosky* v. *Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982). We need not decide whether a parent's visitation rights are constitutionally protected, because Donna has more than a right to visitation. The state court's custody order of March 19, 1975, which incorporated the terms of the informal letter agreement, is ambiguous, but it expressly gives Donna custody of Mike. That it also gives Michael "possession" of the child does not transform Donna's right to one of mere visitation. And in any event Donna was awarded "full care, custody and control" in 1979.

That plaintiff has been deprived of a constitutionally protected right, of course, does not answer the whole question of whether she has a claim for relief. She must also show that she was deprived of this right without due process of law. Ordinarily we would go on at this point to consider what process is due. But here plaintiff got no process at all. At no time was she allowed to challenge, before some impartial authority, the government's conclusion that it was necessary to take Mike into the WPP, and to keep him there, in order to protect Michael's life. We can readily agree with the Marshals Service that *advance* notice of a person's being taken into the program need not be given. That would destroy the whole premise of secrecy on which the Program is based. But it should have been possible to devise some kind of post-deprivation process in which Donna could be heard. We do not see why such a process would necessarily have exposed Michael and Mike to such an unreasonable risk as to justify the permanent destruction of a mother's rights, sanctioned not only by nature but by the courts of Missouri. *But cf. Leonhard* v. *United States,* 633 F.2d 599, 620 (2d Cir. 1980), *cert. denied,* 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981) (expressing doubts in the context of a constitutional claim brought by relocated children, as to whether a meaningful post-deprivation hearing could be arranged without endangering the children).

[3] The rights of parents, to be sure, are not absolute. Compelling public necessity can justify their termination if proper procedures are followed. We recognize that the Witness Protection Program has been authorized by Congress and is an important part of the war against organized crime. But there is no evidence that Congress intended a separation of parent and child in a situation like that present here. In fact, the Marshals Service itself has in other situations exercised its discretion to accommodate the rights of families. See *Salmeron* v. *Gover,* Civ. No. 81-0471 (D.D.C. May 27, 1981) (in which the Marshals Service returned children who had been relocated with their mother to the father, to whom a state court had awarded custody, in return for the father's agreement to dismiss his habeas corpus action); Oversight of the Witness Protection Program: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. 123 (1978) (in which William E. Hall, Director of the Marshals Service, testified that "I don't think we would ever want to be in a posture of telling one parent: We have relocated your children; you are out of luck forever. I think that would be horrible.") In a situation involving a family in which divorce has occurred, something has to give in order for the Witness Protection Program to have a reasonable chance of working. But here the "give" has all been on Donna's side. She and her son have rights to each other's company that were not created by any government, and that no government should be permitted to destroy without more consideration of her rights than has been given here.

III

The District Court believed there were genuine issues of fact as to whether government action sufficient to trigger the Fifth Amendment had taken place. After deciding that it lacked jurisdiction to grant injunctive relief against Michael because of the domestic relations exception,[11] the court added that Michael was not transformed "into a government actor by virtue of his acting as a witness for the government and entering the Witness Protection Program. Cf. *Bennett* v. *Pasic* [Passic], 545 F.2d 1260, 1263-64 (10th Cir.1976) (witnesses do not act under color of state law)." 539 F. Supp. at 955 n. 8. With respect to the federal defendants, the

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[10] Cf. *Ellis* v. *Hamilton,* 669 F.2d 510, 512 (7th Cir.), *cert. denied,* ——— U.S. ———, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982) ("It is plain to us that the 'liberty' protected by the due process clause of the Fourteenth Amendment includes the right to the custody of one's minor children and that it would be a deprivation of that liberty without due process of law for persons acting under color of state law permanently to separate the children from their parents without notice and hearing.") (dictum).

[11] We address this issue at part IV, infra.

District Court drew a distinction between the initial inclusion of Mike in the Witness Protection Program and his retention in the program. It held that the extent of the government's involvement in the retention of Mike was not so clear as to authorize summary judgment in favor of either the government or Donna. *Id.* at 952, 956.

[4] Certainly there are issues of fact as to the precise *degree* of the government's responsibility for Donna's present separation from her son. The trial on the merits of the claims for damages will no doubt flesh out some of these details. Michael could, for example, decide on his own to let Mike go back to his mother, or to let her see him, and we are not sure to what lenghts, if any, the government might go to dissuade him. We assume for present purposes that all such subsidiary issues of fact will be resolved in favor of the government. Even after making this assumption, we believe the uncontested facts require a finding of government action. The government was involved in a sequence of events which culminated in the abrogation of Donna's right to custody of her child. Government officials took Mike to a new location and gave him a new identity, a new social security number, and new school records. It has paid Michael's lawyer both to contest the state court's orders and to defend against Donn's claim in this case. It continues to conceal the whereabouts of both Michael and Mike. To assert, as the government does, that it was Michael's sole decision to take and retain Mike in defiance of the state-court order is wholly unrealistic.[12]

Similarly, Michael's conduct constitutes government action for purposes of the Fifth Amendment's due Process Clause, not because Michael was a witness for the government, but because he could not have taken and retained Mike without government assistance. (He could have absconded with the child, of course, but his goal of evading the state court's custody jurisdiction would have been much more difficult without the active assistance of the United States.) As the Supreme Court has recently observed, a person may be deemed a "state actor . . . because he has acted together with or has obtained significant aid from state officials. . . ." *Lugar* v. *Edmondson Oil Co.*, —— U.S.——, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). See also *Dennis* v. *Sparks,* 449 U.S. 24, 27–28, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.") (citations omitted); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (holding that a privately owned restaurant's refusal to serve a black patron was state action for purposes of the Equal Protection Clause of the Fourteenth Amendment because the restaurant premises were leased from a state agency and were located in a public building maintained by the state, thereby making the state a joint participant in the discriminatory action). This standard is equally applicable to cases involving federal government action under the Fifth Amendment. E.g., *Warren* v.

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[12] We recognize that an arguably contrary result was reached in *Melo-Tone Vending, Inc.* v. *United States,* 666 F.2d 687 (1st Cir. 1981). In *Melo-Tone* a creditor argued that he had been deprived of property without due process when his debtor entered the Witness Protection Program and the government refused to reveal his whereabouts. The First Circuit held that there had been no "taking" of property for which compensation was due because the interference with the creditor's right to collect and enforce payment of the exercise of lawful governmental power.

We do not believe that our holding conflicts with *Melo-Tone.* The court in *Melo-Tone* recognized that there was governmental action; it merely held that the action did not result in a "taking." Even if this analysis were to apply to a claim of deprivation of a liberty interest such as the one asserted here, it is clear that the interference with Donna's right to custody was a direct consequence of the government's action in taking Mike and refusing to reveal his location and identity.

In addition, we do not believe that our recent holding in *Bergmann* v. *United States,* 689 F.2d 789 (8th Cir. 1982), conflicts with our finding of government action. In *Bergmann* a police officer was killed while investigating a reported burglary committed by a protected witness in the Witness Protection Program. His widow sued under the Federal Tort Claims Act, alleging that the government had negligently selected and supervised the witness. We concluded that the discretionary-function exception to the FTCA applied so that sovereign immunity had not been waived, and that the government was not negligent in supervising the witness because it had no duty to protect the public from the witness, since "the witness protection statutes contemplate and only the protection of witnesses and their families—not protection of the public from the witness." *Id.* at 797. Donna is more than a member of the public; she is the mother of the child taken from the Witness Protection Program by government employees. Moreover, while the protected witness in *Bergmann* burgled a store and killed a policeman without any assistance from federal officials, it is unlikely that Michael could have taken and kept Mike without the government's help.

Government National Mortgage Association, 611 F.2d. 1229, 1232 (8th Cir.), cert. denied, 449 U.S. 847, 101 S.Ct. 133, 66 L.Ed.2d 57 (1980).[13]

[5] The District Court held that it could not command Michael to return Mike to Donna because of the domestic-relations exception to federal jurisdiction. Ordinarily, a federal court will not grant an injunction to compel a parent to obey a state decree awarding custody of the child to the other parent. E.g., *Bennett* v. *Bennett,* 682 F.2d. 1039, 1042–43 (D.C.Cir.1982); cf. *Lloyd* v. *Loeffler,* 694 F.2d. 489, 493–94 (7th Cir.1982) (disapproving an escalating damage award against the absconding parent as the equivalent of an injunction) (dictum). Nevertheless, we do not believe that the domestic-relations exception is a bar to jurisdiction in this case.

Although the historical interpretation of the origin of the domestic-relations exception is probably incorrect, e.g., *Lloyd* v. *Loeffler,* supra, 694 F.2d at 491–92, federal courts have consistently refused to entertain diversity suits involving domestic relations for a number of reasons, including the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts. *Crouch* v. *Crouch,* 566 F.2d. 486, 487 (5th Cir.1978). As we observed in *Overman* v. *United States,* 563 F.2d. 1287, 1292 (8th Cir. 1977), "Federal courts should be extremely wary of becoming general arbiters of any domestic relations imbroglio."

[6] Here, however, we are confronted with a case based on federal-question jurisdiction; Donna has asserted a claim "arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331; see *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).[14] It is unclear whether the domestic-relations exception applies to cases brought under the federal-question statute.[15] We need not decide this question, however, because the exception would not apply in this case in any event. Underlying the various reasons advanced to justify the domestic-relations exception is one basic premise: There is a state forum in which the plaintiff may obtain relief. Here, the state court cannot grant effective relief to Donna Ruffalo. Michael refuses to obey the court's custody order, and ordinary processes for discovering his whereabouts are being impeded by the action of the federal government in providing him a new identity. It is unlikely that the state court could compel the federal officials to divulge the whereabouts of Michael and Mike. If the federal officials were made parties to the state court proceedings, the state court might not have jurisdiction to issue an injunction against them. Bator, Shapiro, Mishkin, & Wechsler, Hart & Wechsler's "The Federal Courts and the Federal System" 429–30 (2d ed. 1973).[16] Even if the state court did have jurisdiction, the officials, once made parties, could remove the action to federal court under 28 U.S.C. § 1442(a)(1) and thus negate the state court's power to grant relief.

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[13] The First Circuit found state action in a case which presented a similar issue. In *Downs* v. *Sawtelle,* 574 F.2d 1 (1st Cir.), cert. denied, 439 U.S. 910, 99 S.Ct. 278, 58 L.Ed.2d 256 (1978), the plaintiff, a deaf mute of borderline intelligence, became pregnant with her second illegitimate child. The plaintiff's sister, with the help and cooperation of state welfare officials, had herself appointed the plaintiff's guardian and gave consent for the state to take the child after it was born and for the plaintiff's sterilization. The court held that the sister acted "under color of state law, since her actions were taken in concert with state officials." Id. at 10.

[14] Although at the time this suit was brought, federal question jurisdiction was not present unless the $10,000 jurisdictional amount was met, we agree with the District Court that this is not a problem here since more than $10,000 in damages was sought. See 539 F. Supp. at 955 n. 8.

[15] Cf. *Overman* v. *United States,* 563 F.2d 1287, 1292 (8th Cir. 1977) ("There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension.") (citations omitted); *Hernstadt* v. *Hernstadt,* 373 F.2d 316, 317–18 (2d Cir. 1967) ("When a pure question of constitutional law is presented, this Court has suggested that the District Court may assume jurisdiction even if the question arises out of a domestic relations dispute . . . . "); *Carqueville* v. *Woodruff,* 153 F.2d 1011, 1012 (6th Cir. 1946) ("In the absence of a federal question the whole subject of domestic relations of husband and wife and parent and child belongs to the jurisdiction of the State Courts.") (citations omitted).

[16] The writer of this opinion has argued that state courts do have jurisdiction to issue injunctions against federal officials, Arnold, "The Power of State Courts to Enjoin Federal Officers," 73 Yale L.J. 1385 (1964), but the Supreme Court has not yet decided the question. In view of the near certainty of removal if the federal officials were made parties in the state courts, we need not pursue the issue here. Cf. *Pennsylvania Turnpike Comm'n* v. *McGinnes,* 179 F. Supp. 578 (E.D. Pa. 1959), aff'd per curiam, 278 F.2d 330 (3d Cir. 1960) (suit in state court to enjoin federal official; removed to federal court; held, no federal jurisdiction because court from which case was removed had no jurisdiction). Whatever the answer to these interesting issues, the fact remains, as a practical matter, that Donna must get relief in this federal suit if she is going to get it from any court.

Moreover, the District Court was asked to enter an injunction which would confirm the state-court decree and would not in any way conflict with it. Even if we accept the rationale of *Bennett* v. *Bennett,* supra, that an injunction directing an absconding parent to return a child in accordance with a valid state custody decree would require an inquiry into the present best interests of the child, a task which a federal court is ill-equipped to perform, *id.* at 1042–43, the District Court in this case had other options. In her Motion for Partial Reconsideration of the District Court's April 30, 1982, order, Donna asked for alternative injunctive relief against the federal defendants. She suggested several ways, short of a direct order for the return of the child, in which meaningful relief could be granted, including the possibility that the court could order the government to reveal Michael's whereabouts unless he complied with the state court's orders (or appeared in state court to contest the custody decree on the merits).

V

[7] We thus disagree, for reasons stated in Parts III and IV of this opinion, with certain of the District Court's legal conclusions. We nevertheless believe that it was prudent for the District Court not to grant any particular form of injunctive relief without further exploration of certain questions of fact. As we have noted, the constitutional rights involved here are not absolute, in the sense that they must prevail at all times and in all places against every competing consideration. There is the possibility, for example, that Donna herself may be in league with organized crime, and that her professed desire to see her son is motivated in whole or in part by a desire to get at Michael. There are hints of such a possibillity in the record. These hints are nowhere near sufficient to justify a finding against Donna on any such issue, but we think the government should be allowed to present proof on it, and that the District Court should make a finding of fact one way or the other. If the findings should go in favor of Donna, the further question would arise of how best to structure a decree to keep the risk to Michael's and Mike's personal safety to a minimum. Not only is Michael's testimony of value to the government, but his and his son's lives and physical safety are obviously deserving of protection for their own sake.

We believe that some form of equitable relief can be fashioned that will vindicate Donna's rights as a mother without unreasonably endangering her son and former husband. Michael can even be relocated a second time if that is necessary. Such action has been taken in other cases. The chancellor in the person of Judge Sachs is much better suited than we are to decide exactly what kind of relief is appropriate. We offer a few observations that may be helpful, but only by way of suggestion, not as a direction. In the first place, direct interference with the federal defendants' own concept of their duty should be kept to a minimum. The District Court may consider whether it is appropriate to order Michael and Mike to submit themselves to the jurisdiction of the state court. The District Court need not concern itself with Mike's best interests, in the sense of whether his welfare would be better served by his living with his mother as opposed to his father. The state decided that he should be with his mother, and if circumstances have changed, Michael is free to show that in the state forum. The District Court should be mindful, however, of the strong interest in protecting Michael's and Mike's lives and physical safety. If Michael disobeys whatever order the District Court enters, it should then fashion some forms of alternative relief. It could, for example, order the Marshals Service to assist the state court in enforcing its own order.

We suggest that the District Court hold whatever further evidentiary hearing it think appropriate as promptly as practicable. It should be possible to hold a hearing fairly soon, within 30 to 60 days of the filing of this opinion. In order to expedite the matter, which has already gone on too long, we direct that our mandate issue forthwith.

The orders denying immediate injunctive relief are affirmed, with further proceedings consistent with this opinion to take place in the District Court.

It is so ordered.

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Protecting the Federal Witness—Burying Past Life and Biography

(By Fred Montanino,* Yale University/Stockton State College)

Currently, there are approximately 14,000 people in America who have had their past lives and personal biographies erased. They live under new identities and are placed in various unsuspecting communities throughout the country. Their ranks swell daily (30 witnesses per month) as the U.S. Justice Department continues to make important criminal cases with the aid of the Federal Witness Security Program.[1]

Title V of the Organized Crime Control Act of 1970 [2] requires the attorney general to take steps for the care and protection of government witnesses and their family members, whose lives, by virtue of their testimony, have been placed in jeopardy. This federal legislation represents the most comprehensive and methodical effort on the part of government to take the initiative against such serious criminal activity as organized crime, white-collar crime, narcotics distribution, and public corruption. This legislation was directed at (1) generating legal mechanisms that would promote the provision of information and evidence (testimony, documents, and the like) upon which federal prosecutors could act in criminal matters; (2) generating pressure for individuals to become government witnesses; (3) ensuring the optimum use of such witnesses, or their testimony; and (4) generating a "secure pool" of witnesses, upon which to draw. The legislation, for obvious reasons, promoted the need for a witness security program and it proposed one that "relies principally on the secret relocation of witnesses to places of safety and well being for them and their families." [3]

PROGRAM PARTICIPATION AND PROCEDURE

Recruitment as a federally protected witness is commonly initiated in the field by control agents who regard the program as an important asset, compensating for some of the major restrictions placed on police procedures. In a sense, the government has decided to capitalize on errors that criminals make—their failures, squabbles, and divisions. Criminally involved individuals who are rejected or double-crossed by their colleagues in crime, or who are apprehended by the authorities, or who may just "want out," constitute 95 percent of the program enrollment.[4]

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[1] Much attention has been paid to the witness in criminal proceedings, and especially to the importance of witness cooperation (see, for example, the President's Commission on Law Enforcement and the Administration of Justice, 1967; National Advisory Commission on Criminal Justice Standards and Goals, 1973; Cannavale and Falcon, 1976; Knudten, 1977). In addition, there has been specific concern over witnesses' fear of physical reprisal and getting people to testify in instances where they are intimidated by the perpetrator (see Goldstock and Coenen, 1980). As early 1967, the President's Commission recommended that the government should establish residential care facilities or "safe houses" for witnesses whose lives are in jeopardy.

See also U.S. Congress (1980). The Justice Department's strategy permits no more than thirty principal witnesses and their family members to enroll in the program per month.

[2] See the Organized Crime Control Act of 1970 (1970: 923-926). To get an idea of violence directed toward witnesses, see U.S. Congress (1981).

[3] See comments in U.S. Department of Justice (1978: 10, recommendation 1). This appears in U.S. Congress (1978: 279).

[4] This figure is drawn from testimony of Howard Safir in U.S. Congress (1980).This is understandable because there are basically two ways that one may qualify as a witness in criminal proceedings. The first category of witnesses is that of "experts," such as are found in medical and technical fields; the remaining category of witnesses contains those who are party to and/or witnesses of the criminal activity in question (for an explanation of the rules governing witness participation in criminal proceedings, see Maguire, 1959; Beeman, 1964; Liebenson, 1961; Liebenson and Wepman, 1964; Wall, 1965).

Participation in the program is voluntary and the prospective clients essentially are offered an opportunity to make a new start in life in return for their assistance and testimony. Three formal conditions must be met in order for an individual to be eligible:

(1) The person is a qualifying witness in a specific case in process or during and after a grand jury proceeding.

(2) Evidence in possession indicates that the life of the witness and/or that of a member of his or her family is in immediate jeopardy.

(3) Evidence in possession indicates that it would be advantageous to the federal interest for the Department of Justice to protect the witness and/or family or household member.[5]

Application for an individual's participation in the program can be made to the Department of Justice by any number of prosecutor's offices—federal, state, and local. Acceptance into the program is determined by the Office of Enforcement Operations, Department of Justice. Protection and maintenance of accepted participants and overall administration of the Witness Security Program are the responsibility of the United States Marshals Service, a bureau of the Department of Justice.[6]

The prospective clients who are considering enrollment have the program explained to them. They are told that their new start in life and physical security require secret relocation to a new area of residence and establishment of new identities for them and their family members. Once debriefed, they are turned over to the United States Marshals Service, which is responsible for constructing new identities, providing new documentation, choosing an area of relocation, moving the clients, and providing physical care and protection.[7]

Program officials admit that a certain amount of temporary upheaval is experienced as a result of these rather unique security procedures, but they are quick to point out that such procedures are the most effective form of protection—far superior to the old system of "safe houses," where witnesses and family members were often crowded together for months at a time under armed guard.[8]

SOCIAL DEATH AND REBIRTH

It would not be unreasonable to use the word "extreme" in describing the transition that protected witnesses and their family members undergo. They find themselves in a position where their past social identities are obliterated as completely as possible. Their personal past biographies cannot be shared with others. They face a future of social relations with others that is dominated by concealment concerning who they have been and pretense as to who they are. They are plucked from the communities in which they reside and secretly relocated great distances, to other communities where they can, for a substantial period of time, remain social strangers "hidden in plain sight." [9]

This change of residence is typically abrupt, accomplished without advertisement or publicity, involving on their part precious little forethought, time for preparation, or, for that matter, final choice as to where they are to be relocated. They are often required to deal with radically changed physical environment and are always required to sever, with very little explanation, social and personal relations with relatives, friends, and whatever networks of acquaintances they may possess. All manner of social identification—anything they may use to prove who they are, such as birth certificates, driver's licenses, social security cards, marriage licenses, voter registration cards—must be surrendered. Similarly, school and service records must be abandoned as well as any professional degrees, certificates of competence, professional or vocational licenses, or any other type of documents or records that bear past identity—and, in the process, all of the rights, privileges, and obligations that go along with them. These people are literally stripped of their identities, their names, and whatever material possessions are associated with them, ranging from

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[5] See comments in U.S. Department of Justice (1978: 11–12).

[6] This structure is suggested in U.S. Congress (1980). This structure is also contained in a letter from Ms. Marilyn Mode, associate director of research, Witness Security Program, to the Yale University FAS Human Subject Research Committee.

[7] The United States Marshals Service is responsible for a great deal more, including maintaining detailed records so that witnesses may be notified and called upon when they are needed.

[8] Safe houses were created by Congress in 1970 with the Safe House Facilities Act. These houses were under the Administration of the United States Marshals Service until 1975, when they were disbanded (see U.S. Congress, 1978).

[9] This phrase is drawn from Waller (1976), who gives a true account of a parent's eight-year search for his children after they were admitted to the program.

house and car to family heirlooms and personal objects (monogrammed jewelry and the like) that could identify them. They are required to divest themselves of whatever relationships, formal or informal, they have had with other people or have cultivated with social institutions and organizations during their lifetimes. In short, in order to maintain biological existence, protected witnesses and their immediate (nuclear) family members must end social existence in the context in which they have known it.

This social death is coupled with an attempt at rebirth. These people are provided by the federal government with certain rudimentary identification documents with which to start new lives. Typically, their new identities are supported with social security cards, driver's licenses, and birth certificates if they come from a state that cooperates.[10] This may sound like rather meager replacement compared to what was given up, but it is by and large all that the federal authority can provide—educational diplomas, marriage licenses, professional and vocational licenses, and many more such identifiers that may be accrued during a lifetime are conferred under individual and/or state authority. Such authorities typically cooperate only minimally in the new identity construction because the new identity is not publicly linked to the old one and thus raises the specter of civil and criminal liability for private or state officials who cooperate. A legal name change is effected for the clients of the program—but this record is sealed and as a result these individuals are born anew, emerging without a traceable past. The consequences of a transition such as this are not hard to imagine, since it breaks the continuity of the social life cycle. As one witness put it: "I'm a born again person with no name, no past, no history. I can't go anywhere, can't do anything; I can't say who I am".[11]

SOURCES OF DISTRESS: THEORETICAL CONSIDERATIONS

The Witness Security Program has provoked much controversy. Many witnesses, and their family members who are in hiding with them, have stepped forward before investigating U.S. Senate subcommittees [12] to talk of their problems. Clients of the program have told their stories to journalists and correspondents [13] who have devoted much attention to the plight of particularly troubled witnesses. Although there has been a great deal of attention paid to the plight of selected witnesses and their family members, there has not been, to date, any systematic attempt to investigate the new social realities in which they live.

The life situation in which clients of the program find themselves may result in social and personal distress, first, in their complete burial of past life and then in their struggles to adjust to new identities and the communities into which they are relocated.[14] Social distress grows from being "set adrift" in the social structure, and personal distress grows from being forced to abandon the comfort and stability that come from a continuous sense of existence between past and present life.[15] There is, of course, a substantial body of social scientific literature that would be applicable in seeking to understand the source of distress inherent in the protected witness experience.

The connection of social and personal identity with ongoing social interaction is widely established and written about extensively (see Berger and Luckman, 1967; McCall and Simmons, 1978; Ullman, 1965; Benson, 1974; Goffman, 1959, 1963, 1971). The rather crucial significance of personal name (especially surname) in social life is also well established (see Durkheim, 1965; Strauss, 1959; Murdock, 1949; Mead,

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[10] Thirteen states and three territories do not cooperate in issuing birth certificates: Alabama, Connecticut, Delaware, Hawaii, Idaho, Illinois, Louisiana, Massachusetts, Ohio, Oklahoma, Oregon, Vermont, Washington, Guam, Puerto Rico, and the Virgin Islands. The District of Columbia does not cooperate either (U.S. Congress, 1980: 9).

[11] See ABC News (1980: 5).

[12] The U.S. Senate Subcommittee on Administrative Practices and Procedures took the first serious look into the program. Director of the United States Marshals Service, Mr. Bill Hall, testified before this committee on April 14, 1978. Most recently, the Governmental Affairs Investigation Subcommittee, chaired by Senator Sam Nunn, heard testimony from Mr. Howard Safir, then acting director of the Witness Security Program, on December 17, 1980. The directors were responding to witness complaints of distress.

[13] See, for example, Graham (1977) and Waller (1976).

[14] The problems of adjusting to a new community as an outsider are dealt with insightfully by Schutz (1964), who captures not only the problems but the feelings of being on the periphery of a community.

[15] More concretely, lack of (1) confidence in playing new roles, (2) knowledge of how to play roles, (3) motivation to do so, and (4) ability to do so causes distress (see Brim and Wheeler, 1976).

1934).[16] Further, the often subtle but nevertheless powerful connection between individuals and their names has similarly been pointed out (Hartman, 1958, 1951; Weitzman, 1970). Witnesses and their family members give up not only a name in its linguistic sense but, more importantly, literally all that it symbolizes and represents. They give up all the material possessions that are tied to it and all the significant others that it ties them to—all of which can cause individuals to experience a sense not only of loss but of being lost. In addition, it is a generally accepted notion that self-image depends, in large part, upon constant relations with the objective world (James, 1982)—upon a sense of "self-sameness" over time coupled with the fact that others recognize and acknowledge this in the course of daily life and social interaction (Erikson, 1959). The relocated people undergo a transition that entails, of necessity, a certain amount of disruption of constant relations with the objective world. Clients of the program are often deprived of familiar and comfortable surroundings and are involved in interaction with others who do not know, and cannot be made privy to, their past. Thus others with whom they interact daily are ill equipped to provide the necessary acknowledgement of whatever continuity protected witnesses seek to project in their daily interactions. Witnesses and their family members are cast into a world of strangers. Their "roots" have vanished and they are left to lie about their backgrounds. Thus their interactions take place with people who do not understand the social shock, social discontinuity, and disruption that these clients have experienced.

People who find themselves in the program must be careful about entering social circles in community life that would require them to jeopardize their much sought-after anonymity (see Simmel, 1950: 330–338). Perhaps even more distressing is the fact that deception, pretense, and false presentations as to who they are in the course of public encounters become a cornerstone of their existence. Almost every encounter represents to these people the kind of danger that lies in inadvertent self-disclosure, incongruent and potentially discreditable presentations of self, and "unthinking slips" that could lead to their "unmasking." Their overriding goal is to conceal their past lives, to pretend not to have been who in fact they were, and to pretend to be who in fact they know they are not. Witnesses are likely to experience, more often than others, "strained interaction," impression management that is consciously laborious, and they are likely to employ interaction "avoidance techniques" more often (see Goffman: 1968, 1969).

Secrecy, lying, and an overemphasis on privacy hinder culturally normative social navigation and interpersonal relations, and ultimately take a toll on self-image. There are rules that govern the mode and degree of self-disclosure, and interpersonal relationships depend, in large part, on the way one conducts oneself in this respect. The nature and quality of interpersonal relationships in turn affect one's perception of self (see, for example, Altman, 1977; Derlega and Chaiken, 1977; Warren and Laslett, 1977). Having a past they must judiciously disavow because it can reach out and end their lives, clients of the program are forced to live in fear of intimacy, to be secretive, and to lie. Their lives depend on living an ad hoc cover story. Unlike with spies operating undercover behind enemy lines, slips may not be immediately fatal, but fatal error is possible. The risk of an unguarded reference or of mentioning a real friend from the past puts a constant pressure on the daily life of a client.

Secrecy is a pervasive aspect of all human conduct. According to Bok (1982: 105–106), an individual needs to have a certain amount of control over secrecy and openness in the interests of protecting and securing "identity, plans, actions and property." Such control is necessary for "equilibrium" in personal life and even "surviv-

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[16] Durkheim (1965) gives us some idea of what personal name represents in more than a linguistic sense. Many of the ways in which primitives treated their totems are in fact visible in modern secular society in the ways individuals regard and the uses they make of their personal names (especially surnames): Families gain recognition through last names or similar last names; last names are imprinted on property along with crests or other symbols found in the ancestry. Further, obligations, although nowhere as orthodox as in the primitive case, do nevertheless bind persons of the same last name. To give up a name, then, is to give up an identity rooted in a collectivity—it means literally to give up a collectivity that has its roots in the knowledge of mutual interest, trust, friendship, and help. In discussing the dialect between personal and social image, Mead (1934) implies that personal name is the vehicle that, in large part, permits self to be viewed as object—that we come to know ourselves in the social sense through our names and all that we have or perceive others to have attributed to our names throughout our lives. For Berger and Luckmann (1967), to give up a name, in the sense that protected witnesses and their family members do, is to give up a specific placement in the social world—further, that to be given an identity requires a specific placement in the world. Thus to give up a name and significant others who are associated with it is, in a sense, equatable to giving up the world to which this identity points.

al." Further Bok (1982: 21) tells us that: "not only does control over secrecy and openness preserve central aspect of identity; it also guards their changes, their growth or decay, their progress or backsliding, their sharing and transformation of every kind."

In support of this claim she points to the accounts of spies and undercover agents who have attested to the negative effect of prolonged secrecy and concealment upon judgment, action, and their individual sense of identity.[17]

In this instance, the object of secrecy is past social identity and personal biography. As Simmel (1950) points out, the exchange of social identity and bits and pieces of past personal biography is a minimal, necessary requirement and an essential part of the form that social encounters take. Managing such a secret when interacting with others is virtually unavoidable and this affects the nature of the resulting social relationship.

In order to sustain these relatively high levels of secrecy, witnesses may employ neutral and even negative means. They may, for example, simply avoid social interaction or, if this is not possible, fabricate or lie about their past personal biography, risking exposure as a result of the general tendency of people to assess the honesty of others with whom they interact. Their secret thus thrusts them into the position of seeking social isolation in the midst of a social order that requires at least minimal levels of contact and participation. Simmel (1950: 323) points out: "In the interest of interaction and social cohesion, the individual must know certain things about the other person. Nor does the other have the right to oppose this knowledge from a moral standpoint, by demanding the discretion of the first: he cannot claim the entirely undisturbed possession of his own being and consciousness, since this discretion may harm the interests of society."

In other words, witnesses are confronted with the fact that it is not socially acceptable to make too little known of oneself and to be too secretive—especially with regard to demands for information about social identity. Such requests for disclosure are viewed as legitimate and beyond the pale of discretion. Since clients of the program cannot demand the discretion of others in this respect, they are confronted daily with having to manage and disclose information about themselves that skirts dangerously close to a secret they perceive to be life threatening.

This aside, the secret in and of itself creates dynamic tensions and conflicts with which witnesses must deal. Simmel (1950: 333–334) tells us: "The secret . . . is full of the consciousness that it can be betrayed . . . is surrounded by the possibility and temptation of betrayal; and the external danger of being discovered is interwoven with the internal danger . . . of giving oneself away. The secret puts a barrier between men but, at the same time, it creates the tempting challenge to break through it by gossip or confession—and this challenge accompanies its psychology like a constant overtone."

The witnesses must deal with the internal threats of inadvertent self-disclosure and betrayal as well as the external threat that the sheer need or desire to know will drive others to penetrate their secret. There is also the worry about outsiders who, although not consciously trying to penetrate their secret, gain access unexpectedly (see Simmel, 1950: 324).

There is every reason to believe that clients of the program are liable to experience, more often than others, a pervasive sense of powerlessness. What seem like everyday routine matters to others become monumental roadblocks for these clients. After the transition they cannot provide a past address, housing, employment, credit references, or any manner of record or proof that attest to who they have been. Although they are provided with new names, the names are, in covert terminology, not properly "backstopped." [18] Their new identities are not constructed with verifiable past, personal biographies. These people reenter society with a tabula rasa and become, in the parallel world of "records, dossiers, and files" (see Wheeler, 1969),[19] very unusual, if not unique. This places them at a disadvantage in applying

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[17] For a discussion of the negative effects of acute secrecy on children, see Cottle (1980).

[18] Program officials admit this and point out that it is a unique problem, one of developing a long-term backstop for a new identity. The FBI and the CIA have had considerable experience with short-term backstop, but not even they have procedures for long-term backstop. For a discussion of this problem, see U.S. Congress (1980).

[19] Wheeler (1969) tells us that records, dossiers, and files are maintained for almost every official aspect of our lives, and many of the authors in his book point to the potential abuse of files. Everyone has need to return to a past personal biography and, although not explicitly stated, the trouble one can encounter when one has no parallel life on record is readily imaginable.

and competing for, among other things, employment, housing, and credit. As Gary Haak, a refugee from mob wars in Rochester, New York, put it: "When I left home I had excellent credit. I had a good deal of work experience. I had a high school education and some college credits. Gary Haak was a real person. Now in my new identity I am a man without a past. I have no documentation for my past whatsoever. I am a man who never had a job before. I am a man who never went to school. I have no former addresses or phone numbers. Have you ever tried to get a telephone or rent an apartment or buy a home or auto or life insurance without giving former addresses or former phone numbers? . . . One response is to lie." [20]

Lying to ensure their secrecy poses a personal, moral conflict to the witnesses and places them in an antithetical position with regard to social structure. As Simmel (1950: 313–315) states in discussing modern, complex culture: "Truthfulness and lie are the most far-reaching significance for relations among men . . . exisence rests on a thousand premises which the single individual cannot trace and verify to their roots at all, but must take on faith. Our modern life is based on a much larger extent than is usually recognized upon the faith in the honesty of the other . . . we base our gravest decisions on a complex system of conceptions, most of which presuppose the confidence that we will not be betrayed. Under modern conditions, the lie, therefore, becomes . . . something which questions the very foundation of our life . . . if we were not deterred from it by the utmost severity of moral law; then the organization of modern life would be simply impossible; for modern life is a "credit economy" in a much broader than a strictly economic sense."

To ensure the integrity of this "credit economy," Simmel (1950: 315) tells us that there is a force he calls "enlightenment" at work in society that "aims at the removal of the untruths operating in social life." The stress placed in society on those who must lie is thus clearly evident and built into the social structure itself. Since clients of the program are creatures of the social structure they cannot help, one would assume, but feel resistance to lying and distress over having to lie. Furhter, lying and concealment are counterposed to closeness in any social relationship and relegate those who practice them to an existence of social and personal distance from others.

In his 1982 presidential address to the American Sociological Association, Goffman (1983: 2) presents "the case for treating the interaction order as a substantive domain in its own right." He tells us that, "of all the social structures that interface with the interaction order, the ones that seem to do so most intimately are social relationships" (Goffman, 1983: 13). Stressing the centrality of social identity, name, and past personal biography in social encounters, he points out that "each participant is constrained to demonstrate that she or he has kept fresh in mind not only the name of the other but also bits of the other's biography. Inquiries will be in order regarding the other's significant others, recent trips, illness if any, career outcomes, and sundry other matters that speak to the questioner's aliveness to the world of the person greeted. Correspondingly, there will be obligations to update the other regarding one's own circumstances . . . . one might have to admit that the obligation to maintain an active biography of our acquaintances (and ensure that they sustain the same in regards to us) does as much for the organization of encounters as it does for the relationship of the persons who encounter each other [Goffman, 1983: 13]."

Couple this with the fact that feelings of "ease of uneasiness" unselfconsciousness and wariness are central" (Goffman, 1983: 3) to this interaction process, and we have identified yet another source of potential distress that clients of the program may encounter during the course of daily life.

THE NATURE OF THIS RESEARCH

This research focuses on the relative distress that various clients of the Witness Security Program experience in adjusting to new identities and communities while keeping their past identities and personal biographies secret. The major hypothesis, subsequently confirmed, underlying the study design is as follows: "The amount and degree of distress that is experienced over relocation and establishment of new identity varies among clients of the program. The difference or variance in the level of distress can be accounted for by the various concrete elements of a client's social reality."

This work represents the results of a pilot study [21] involving 24 clients of the program. The research was made possible through the consent and cooperation of the

[20] See the testimony of Gary Haak in U.S. Congress (1980: 62).

[21] The reader should be cautioned about the extremely tenative nature of the findings.

United States Marshals Service. Protected witnesses are in a sensitive position. It was realized that the life situations of federal witnesses and their family members who were still in active hiding would effectively preclude any form of safe, direct, face-to-face contact and administration of questionnaires by the researcher. It was also significant from the viewpoint of methodological access to these subjects that the Marshals Service acted as a link between witnesses' past and present lives and thus occupied a custodial position with regard to knowledge of their whereabouts and their general records. Use of custodians or intermediaries in making contact with subjects who are in a sensitive, vulnerable, or dangerous situation is not an uncommon practice, and it is a practice that has many advantages when dealing with for example, mental patients, prisoners, and in the case of protected witnesses. Such a practice has received attention in the literature on research methods and is described rather comprehensively by Boruch and Cecil (1979): 108): "Where . . . potential respondents are unavailable to the researcher . . . or where the researcher prefers not to have direct access, then a custodian (or intermediary) may be incorporated into an alias based system for linkage. . . . the custodian or agent takes responsibility for transmitting inquires and instruction from the researcher to the respondent; responses are supplied under an alias from one time to the next. The use of an intermediary here may be justified on the grounds that cooperation is more likely if the inquiry is channeled through an agency with which the respondent is familiar. . . . [This] insulates the researcher from the respondent and so prevents certain forms of corruption of the system . . . channeling both the researchers inquiry (or instrument) and the respondent's reply through the . . . custodian . . . in addition may serve a screening function, depressing the likelihood of deductive disclosure, eliminating unnecessary or inappropriate respondent types.

Also, in the case of protected witnesses one may add that the screening function of the intermediary, or the Marshals Service, would serve to prevent inadvertent or unwitting self-disclosure by the respondents, as to their present or past whereabouts or identities from reaching the researcher.[22]

After some prolonged reflection about the sensitive relationship between marshal and witness, and after consultation with the United States Marshals Service concerning their security requirements, a self-administered, survey research questionnaire design, with opportunity for open-ended responses, was decided upon. The survey instrument was designed in such a manner as to allow for quantification and measurement of client distress across two major aspects of program participation: (1) distress over relocation and adjustment to new community, and (2) distress over adjustment to and management of new identity. These were treated as dependent variables that were believed to be affected by various independent variables such as witness status, age, time in program, nature of move, education, and race.

THE INDEPENDENT VARIABLES: SAMPLE PARAMETERS

When we look at sample parameters we are essentially looking at the range of independent variables. Because of the limited number of questionnaire instruments to be administered, an attempt was made at maximizing differences among respondents with regard to life situation and circumstance. An object of the pilot study was to see if, in fact, adjustment or distress (dependent variable) was affected by various differences in the life and circumstances of respondents (independent variables). Hence a broad range of life situations and circumstances in the same population was desirable.

The sample was composed of a total number of 24 cases. Of these, 13 respondents were male and 11 were female; this was recorded under the independent variable SEX

The AGE of respondents was broken into five categories. Ten respondents were between the ages of 19 and 29; nine respondents were between the ages 30 and 39; two respondents were between the ages 40 and 49; two were between 50 and 59; and only one was 60 and over.

For the independent variable RACE, twelve respondents reported themselves as white, seven Black, and five Hispanic.

The variable LVGSIT (living situation) was divided into four categories. Seven respondents reported that they lived alone; five reported that they lived with a spouse or cohabitant (referred to as "partner"); ten reported that they lived with a partner

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[22] There are, of course, many forms of bias to which the reseacher must be attuned when employing intermediaries in the methodological approach. In this instance, various avenues of possible bias or harm to the human subjects were explored in conjunction with the Yale University Human Subjects Research Committee.

and children; and two reported that they lived with children only. Of those who reported children (NUMCHL), three reported child; six reported living with two children; one reported living with three children; one reported living with four children; and one reported having six children. A total of twelve respondents reported living with children, and twelve reported not having children with them.

The independent variable TMEPGM (amount of time spent in program) was broken into six categories for the sake of ease of statistical manipulation. Six respondents reported that they were in the program for 5 months or less; seven said they were enrolled between 6 and 12 months; six reported enrollment between 13 and 23 months; two between 24 and 35 months; one between 36 and 47 months; and two reported being enrolled for 48 months or longer.

The independent variable EDU (level of educational attainment) was broken into three categories. Thirteen respondents reported having between nine and twelve years of education (high school); nine reported having between thirteen and sixteen years of education (college); and two reported that they had seventeen or more years of education (college plus).

As for the variable WITSTA (witness or not), fifteen reported that they were the actual witness, while nine reported that they were partners (spouses or cohabitants).

Program enrollment requires relocation and the independent variable NTRMVE (nature of move) was used to record where respondents moved from and to. Thirteen respondents reported that they moved from an urban area to an urban area; six reported that they moved from an urban area to a rural area; four reported that they moved from a rural area to a rural area; and one reported moving from a rural area to an urban area. Altogether, nineteen respondents moved from an urban area or were urban movers, while five were rural movers.

The independent variable COMCON (connectedness to community) was computed from and based on respondent answers to a "checklist" that required that they provide information concerning membership in community organizations; activity with neighbors in the community; proximity to work, school, and place of worship; and perceived relative happiness while living in old and new neighborhood.

THE DEPENDENT VARIABLES: BUILDING SCALES TO MEASURE RELATIVE DISTRESS

This study deals with two major dependent variables: (1) SCADJREL, or score on distress over adjustment to relocation; and (2) SCADJID, or score on distress over adjustment to and management of new name and identity.

The scales for the dependent variables SCADJREL and SCADJID were constructed from responses to Likert-type, closed-ended questions located in Sections B and A, respectively, of the survey questionnaire. Each of the questions was coded on a numerical scale ranging from 1 to 5, with 1 representing the least distress a respondent could report and 5 representing the most distress.[23]

The computer was instructed to provide question-by-question frequencies across the entire sample of respondents—it provided for each question the numerical value of all responses. These distributions were examined, and those questions that exhibited the greatest range of responses were incorporated into individual scales.

ADJUSTING TO NEW COMMUNITY

How well clients of the program adjust to relocation is very much influenced by whether they are the actual witness or someone else who nevertheless is also in hiding. The data suggest that the actual witness seems to adjust more readily and is less distressed over his or her surroundings (see Table 1, SCADJREL with WITSTA). Perhaps just the sheer pressure of being a witness in a serious criminal proceeding serves to mute other forms of discomfort. To the extent that witnesses, as opposed to nonwitnesses, have a more personalized and intimate knowledge of former "cohorts," they may better understand the necessity of relocation. Appreciating the stake that one has in relocation may, in fact, make the experience more bearable.

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[23] For the dependent variable SCADJREL, the various questions incorporated into the scale probed the respondent's feelings of comfort or discomfort with new and old communities. The questions probed feelings about (1) geographic landscape or physical surroundings, (2) social landscape or new and old community structure and networks, and (3) "interactional" experience with members of the new community. For the scale that composed the dependent variable SCADJID, various questions were aimed at measuring the degree of connectedness to new name and identity. These questions probed, for example, (1) how well new name and identity were incorporated into self-perception, (2) how well respondents managed their new names and identities when interacting with others, and (3) difficulty experience in keeping past name and identity secret.

As one witness state: "I feel just as though I'm walking down a hallway with many doors, and behind each door is a dragon, and I try to stay away from dragons and just enjoy my walls."

TABLE 1.—BIVARIATE REGRESSIONS, DEPENDENT VARIABLE: SCADJREL (N=24)

	COMCON	WISTA	NTRMVE	AGE	TMEPGM[1]	SEX	RACE	LVGSIT
B	−0.392	0.511	0.275	0.188	−0.524	0.328	0.148	0.244
Standard error (sb)	.112	.190	.104	.088	.301	.201	.131	.228
t=/sb	[1]3.5	[1]2.9	[2]2.64	[3]2.14	[4]−1.74	1.63	1.13	1.07
Beta	−.596	.496	.490	.415	−.347	.328	.238	.222

[1] TMEPGM—3 years. [2] Significant at .005 level or below. [3] Significant at .01 level. [4] Significant at .025 level. [5] Significant at .05 level.

Further, 95 percent of the actual witnesses had a former life that made them intimate with keeping secrets and lying. In many instances secrecy was a cornerstone of identity, plans, and actions of their criminally involved past lives. Thus they generally are no strangers to secrecy and concealment and, depending on the longevity of their past criminal careers, have had a great deal of practice in keeping secrets. Therefore, keeping past personal biography and social identity secret from neighbors in their new communities is less distressing to them than it is to their spouses or cohabitants who may be in hiding with them.

Lying to ensure secrecy is exceptionally distressing to the nonwitnesses in hiding. As two spouses put it: "I become self-conscious when I have to lie to people. I'd rather be by myself and family than put myself through the agony of too many close relationships. I always think I might slip and get caught in the lie, or bring doubt to people's minds. It's hard to make friends because of lack of background . . . you feel self-conscious and paranoid . . . that is, being friendly without anxiety.

"I feel that people know I'm lying to them . . . I'm not comfortable with myself . . . I just haven't gotten the swing of lying to people and to feel that I'm doing it right . . . to be comfortable with myself."

These responses also speak to the inherent tension and conflict that accompany secrecy—the fear of discovery and self-disclosure. It is little surprise that the relative novice is much more attuned to this tension.

Another significant and very strong relationship is to be found between adjustment to relocation and the nature of the move. The data suggest a very strong causal relationhip between the two (see Table 1, SCADJREL with NTRMVE). Clients of the program who move from urban areas to either urban or rural areas adjust better than those who move from rural areas to either another rural area or an urban area. Where the client moves *to* is not as strong a predictor of distress as where the client moves *from*. The people with the least distress are those who move from an urban area to another urban area.

Nonurban or rural movers are more distressed in adjusting to their new community in part, one can assume, because of the difference in the "social landscape" between nonurban and urban areas. Intimacy, and a desire or need to know more about past personal biography, is much more prevalent in nonurban or rural areas. There is less social distance between people in less urbanized areas. There is also less transience and hence all members in the community naturally inquire more about new entrants.

Urban areas involve greater social distance between community members and thus afford more anonymity—there is less "legitimate" encroachment or inquiries by neighbors about and upon one's past. If you have lived your life in urban areas you do not grow accustomed to the greater sense of community intimacy that exists in nonurban areas. One who has spent a life in nonurban areas, on the other hand, becomes accustomed to a sense of greater intimacy and legitimate inquiry and disclosure between neighbors. Such people will find it easier to keep their pasts secret in urban areas, but, at the same time, will feel more distressed over the "coldness" and distance they find there. As one family member of a witness put it: "I miss the warmth, a relationship with friends and family—everyone here is so cold and hung up, not natural, made up, not for real."

Further, if these rural movers move to another rural or nonurban area they will feel distress over not being able to meet legitimate inquiries by neighbors who will demand more intimacy.

Age of client is another important predictor of distress upon relocation. Increasing age is associated with increasing level of distress upon relocation. The data point to a very strong, significant relationship between the two (see Table 1, SCADJREL with AGE). This relationship holds for both witness and nonwitness alike. Starting life all over again and readjusting to unfamiliar surroundings and people seem to be much more strenuous the more one has invested in, and grown accustomed to, past surroundings and patterns of living.

In addition, the older one is the more past life one has to keep secret and thus the more intricate ad hoc cover stories must be in order to be convincing. Others expect a fuller recount of past personal biography of older people as opposed to younger people—inquiries and the responses to them are anticipated to be deeper and fuller. The bottom line simply is that one has to fill greater gaps in past life. Such pressure led one witness, over 60 years of age, to state very simply, "The less people I know the better!" Another witness, over 50 years of age, laments: "I no longer can be free to make new friends and I feel I have become rather secretive and introverted. I am lonely, I miss friends . . . . this is an abrupt change in my way of life."

The amount of time one has spent in the program seems to have a quieting effect on distress over relocation. Familiarity with new surroundings and people undoubtedly leads to increased adjustment (see Table 1, SCADJREL with TMEPGM). More precisely, the data suggest that after two and, especially, three years, the distress that clients of the program experience over relocation decreases substantially. One has by this time presumably established oneself in the new community, has become familiar with it, and hence is more adjusted to it.

Further, the more time one spends in the program the more practice one has at concealing and the less self-conscious one becomes over practicing secrecy. As one witness put it: "Only I know where I come from and people only know what you tell and show them." Yet another client of the program states: "I feel that I have adjusted but it has taken at least a year and one half to reach this point." Add to this the fact that every day one spends in the program among community members one is, in fact, building personal biography—another reason for increased adjustment as time passes. One witness pointed to this in a very straightforward fashion: "Every day I make history of who I am." Witnesses and their family members thus feel less wary and self-conscious as time in the program increases—there is a growth of biography in their locations and inquiries ebb.

The previous finding is supported by the fact that the more connected clients of the program are to the new community, the less distress they experience over relocation and the more adjusted they become. Community connectedness was measured with various questions concerning membership in community organizations and daily contact with neighbors, as well as proximity to work, schools, place of worship, and the like. The data suggest a very strong and inverse (negative) relationship between distress over relocation and community connectedness (see Table 1, SCADJREL with COMCON).

Although nowhere as pronounced as the previous relationships. (see Table 1, SCADJREL with LVGSIT), clients of the program who live alone seem to adjust to relocation better than those who are living with someone else. This finding may be explained, in part, by the fact that there is probably less concern over disclosure and betrayal—the inherent tension of secrecy is easier to manage if you do not have to rely on others to keep it. Further, when living alone there is less chance of contradiction or need to coordinate fabrications about past life. This problem of living with others and maintaining secrecy about past life and social identity is perhaps especially pronounced when children are involved. As one mother in hiding pointed out: "Well, it's hard for children to adjust to their new name—I would always be after them and keep the children from talking about their father—It's hard on my kids because they don't understand why they have a new last name."

ADJUSTMENT TO NEW NAME AND IDENTITY

Distress over adjustment to and management of new identity was affected by a number of variables. It seems that practice with new identity results in better adjustment. There was a strong inverse causal relationship between the amount of time spent in the program and the distress experienced over new name and identity (see Table 2, SCADJID and TMEPGM). More specifically, clients in the program for two or more years report considerably less distress over adjustment to and management of new identity than those who have spent less time in the program and hence less time under a new identity. There is undoubtedly, a certain amount of time needed for clients to establish some form of continuity between their past and their present identities. A transition period is indicated in which a client "plays" or prac-

tices with the new identity in order to adapt past identity to it and to feel comfortable in managing it with others.

One witness in the program over a year speaks to the discontinuity in taking on a new name and identity: "I miss being around people I grew up with because they all knew the real me . . . taking on a new name and identity is like becoming a completely new person that is a stranger."

Underscoring the importance of time, another witness states: "Initially adjusting was more difficult, after three years it is easier than anticipated." Underscoring the need for the continuity in identity, another witness states: "The problem is being able to communicate 'who I am' without letting anyone know."

When asked how people in the program can be helped in adjusting to new name and identity, another person pointed out: "Periodically being able to communicate with someone who knows the old you, or at least knows your situation . . . to be able to speak to someone without being on your guard, this can relieve a lot of pressure sometimes."

Taking on a new name and identity in the sense that protected witnesses do is a great deal different from any other instances, such as marriage, of taking on a new name in society. As another client of the program stated: "Besides a new name I have to become a new person and forget part of myself."

The client's race had a rather strong and direct effect on distress over new identity (see Table 2, SCADJID with RACE). Ethnic minorities, especially Hispanics, reported much stronger distress over adjustment to and management of new identity than did their white counterparts. This may be due in part to the increased investment such people may have in the extended family and the past identity that went with it. Their white counterparts, no doubt, are more "nuclearized" in their past familial relationships and can therfore adapt to a new familial name more readily with less distress. One minority respondent said that the worst aspect of taking on new name and identity was "I lost my born family name."

TABLE 2.—BIVARIATE REGRESSIONS, DEPENDENT VARIABLE: SCADJID (N=24)

	TMEPGM [1]	RACE	EDU	AGE	LVGSIT	NUMCHL	COMCON	NTRMVE
B	−0.474	0.242	0.191	−0.125	−0.277	0.250	−0.163	0.138
Standard error (sb)	.233	.120	.113	.090	.219	.199	.131	.112
t=/sb	[2] 2.04	[2] 2.02	[3] 1.69	−1.39	−1.26	1.26	−1.24	1.23
Beta	−.397	.395	.339	−.284	−.260	.258	−.238	.254

[1] TMEPGM ± 2 years. [2] Significant at .025 level or below. [3] Significant at .05 level.

The more educated a client of the program is, the more distress he or she will experience over adjustment to new identity (see Table 2, SCADJID with EDU). Higher education causes more distress over adjustment to and management of new name and identity, probably because all that higher education bestows in terms of life chances is lost in the transition.

Although not as strong as the previous relationships, the age of the client seems to have the effect of decreasing distress over adjustment to new name and identity. Increasing age, although making for more distress over adjustment to relocation, made for less distress over adjustment to new name and identity (see Table 2, SCADJID with AGE). A firm sense of who one is, which the data seem to indicate comes from advancing years, seems to allay the distess over changing outward manifestations (name), and lessens the distress over how one represents self to others.

A client who lives with another adult seems to experience less distress over adjustment to new name and identity than one who lives alone (see Table 2, SCADJID with LVGSIT). The data seem to indicate that companionship with someone known in the past aids in maintaining continuity between past and present identity.

On the other hand, the presence of children seems to produce more distress over adjustment to and management of new name and identity. There was a fairly strong causal relationship between distress and the presence or absence of children (see Table 2, SCADJID with NUMCHL).

Connectedness to community, as with the case of adjustment to relocation, diminishes the amount of distress that is experienced over adjustment to and management of new identity. As connectedness to new community increases, distress over adjustment to new identity decreases. There was, although not strictly significant, a somewhat strong, negative relationship between the two (see Table 2, SCADJID with COMCON).

The nature of the move seems to increase the distress over adjustment to new name and identity. Again, as with adjustment to relocation, rural movers experienced more distress than urban movers over adjustment to new name and identity (see Table 2, SCADJID with NTRMVE). On the one hand, rual movers may attach more significance to their names, may have more invested in them; on the other, this relationship between nature of move and adjustment to new name and identity may have been affected by rural movers' higher degrees of distress over relocation. In any event, a larger sample is needed to investigate these implications further.

CONCLUDING REMARKS

It is important for social scientists to put all this in proper perspective. True, the Witness Security Program and the 14,000 people it shields are very important in and of themselves. However, the experiences of people in the program may teach us important lessons about secrecy and the social milieu. We see that when the social fabric is torn, when individuals are erased from one part of it and replaced in another, even by an authority such as the federal government, with the vast resources at its command, problems arise. Witnesses and their family members who are in hiding with them are liable to experience distress. It seems that the notions that we can live apart from the collective, or be part of it and not be affected, and belief in the absoluteness of our own individuality tend to be exaggerated.

The social structure is indeed flexible, but the witnesses protection experience tells us that there are limits. We construct reality from the world around us, and past life and interaction are essential parts of this construction. We tend to build "collective recognition" [24] into the life cycle and use this as a vehicle to provide legitimate "passport" in society. We are thoroughly social beings who tend to look with suspicion upon those who do not have the ability to demonstrate expected and accepted collective participation. We place an inordinate amount of faith not only in the institutionalized way of executing collective life and the bureaucracies we have built to administer it, but in the individuals who hold office, who are in a very real sense the "gatekeepers of social legitimacy." As much as we would like to believe that who we are and what we can do are either self-evident or well within our ability as individuals to demonstrate to the satisfaction of others, we must recognize that this is not precisely the case. Society may foster in its members feelings of independence or even security in isolation, but this is, by and large, an illusion.

The protected witness experience teaches us further that the process of social legitimacy is not monolithic, that there are many "gatekeepers," and that, in fact, we all may be counted upon to act in contributing integrity to the process whenever we interact with one another. We cannot escape responsibility for our own past performance, nor can we easily assume a rightful place in collective social life without some recognition of it. We cannot totally divorce ourselves from others who have been part of our social life without losing the part from which we seek to divorce them. Finally, it is clear that all but our most incidental daily social encounters are rooted in a mutual pact of trust that is more sensitive to fabrications than we currently believe.

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[24] As members of a collective, we tend to involve others, sometimes voluntarily and other times by requirement, as witnesses to many aspects of our lives. In this sense, "collective recognition" can range from informal to formal. In any event, orderly social life often depends on such recognition. For example, Wheeler (1969) points out that a birth certificate points out our formal entrance and a death certificate our formal exit from society. Various rites of passage in between are marked by ceremony and require collective recognition. We are likely, for example, to graduate from school, to marry, and to pass through myriad other such orderly progressions in the course of the life cycle, all of which involve varying degrees of collective recognition.

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